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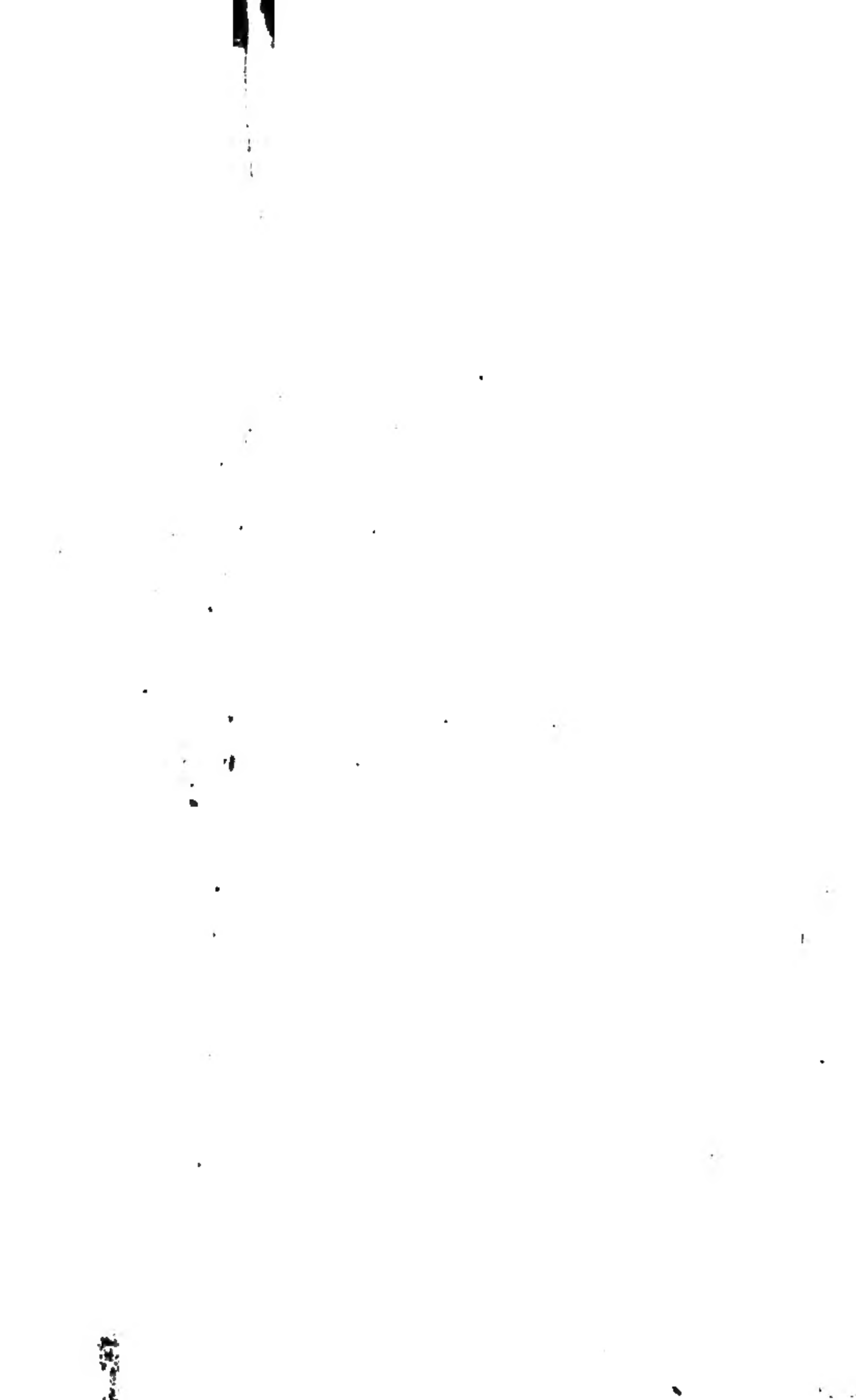
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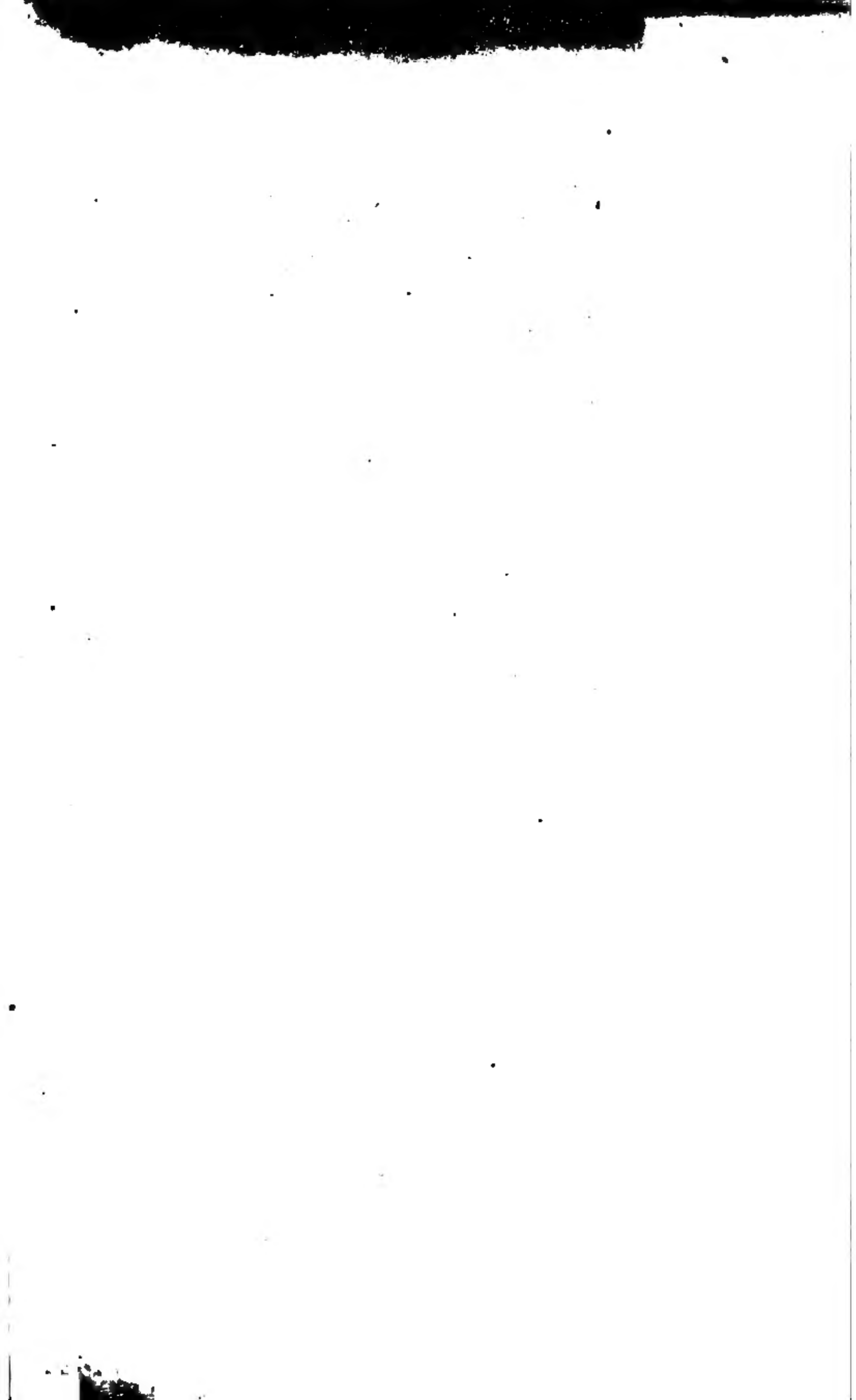
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**THE
AMERICAN
RAILWAY REPORTS**

**A COLLECTION OF
ALL REPORTED DECISIONS RELATING TO
RAILWAYS**

**BY
JOHN A. MALLORY
OF THE NEW YORK BAR**

VOL. III

**NEW YORK
JAMES COCKCROFT & COMPANY
1874**

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AMERICAN RAILWAY REPORTS.

LAND v. COFFMAN.

50 *Missouri*, 243

Supreme Court of Missouri; July Term, 1872.

Lands.—Purposes for which railway company may take and hold real estate. A railway company which has been authorized by the legislature to receive and dispose of real estate at its pleasure, for the purpose of aiding in the construction of the road, and to pay debts contracted in its construction, as well as to hold lands for road-beds, depots, &c., can not be permitted to become a large landed proprietor for purposes not connected with its creation. But the question as to the amount of lands which it may properly receive can only be raised in a proceeding by the state against the company; it will not be determined in an action between private parties.

Lands.—Deeds. A voluntary conveyance of land to a railroad company may pass all the title of the grantor, although a court of equity would not compel performance of an executory contract to convey the land.

Appeal to the supreme court of Missouri from the court of common pleas for Johnson county.

This was an action of ejectment to recover possession of certain lands held by the defendants, claiming title under and through the Pacific Railroad Company.

The facts in the case and the questions arising upon them appear in the opinion of the court. Judgment was rendered for the defendants; from which the plaintiff appealed.

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Elliott & Blodgett, for the appellant.

Phillips & Vest, for the respondents.

ADAMS, J.—This was an action of ejectment. Both parties claimed under one James C. McKeehan, who was the patentee under the United States for the land on which the lot in controversy was situated.

The defendants claimed title through the Pacific Railroad Company, or rather through Frederick L. Billon, trustee for the sole use and benefit of the Pacific Railroad Company. The deed to Billon embraced one hundred and fifty-one town lots, distributed alternately throughout the town of Knob Noster, situated on the line of said railroad, and five and a half acres of depot grounds, and was executed to the said trustee in 1858, for the use of said company, for and in consideration of the sum of one dollar and the benefits which the grantor expected to obtain from the location of a passenger and freight station upon the land thereby conveyed; and the deed also authorized a sale by the trustee of all such portions of the real estate thereby conveyed as should not be required for the purposes of said road, at such time and in such manner as the board of directors of said company should deem most conducive to the interest of said company.

The defendants claimed title under and through this conveyance to Billon, and have the oldest paper title, provided the deed to Billon as trustee is valid.

Numerous instructions were given and refused, raising the question as to the power of the Pacific Railroad Company to take, hold, and dispose of the lands in question; and the circuit court having decided these questions in favor of the defendants, the plaintiff has brought the case here by appeal.

The question as to the power of the Pacific Railroad Company to receive grants of land and to dispose of

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them depends upon the proper construction of its charter and the laws of this state referring thereto. By section 1 of the charter, among other things, it is provided that it "may hold, use, possess, and enjoy the fee simple or other title in and to any real estate, and may sell and dispose of the same." See *Laws of Mo.* 1849, 219. Section 7 of this act was amended in 1851 (*Laws of* 1851, 272, § 9), and provides that "said company shall have power to locate and construct a railroad," &c., "and for that purpose may hold a strip of land not exceeding one hundred feet wide, except where it may be necessary for turn-outs, embankments, or excavations, in which case they may hold a sufficient width for the preservation of their road, and may also hold sufficient land for the erection and maintenance of depots, landing-places or wharves, engine-houses, machine-shops, warehouses, and wood and water stations."

Section 20 of the act of 1849, above referred to, provides that "the operations of said company shall be confined to the general business of locating, constructing, managing, and using said railroad, and the acts necessary or proper to carry the same into complete and successful operation."

By section 57 of an act entitled "An act to authorize the formation of railroad associations and to regulate the same," approved December 13, 1855, it is provided that "all existing railroad corporations within this state, and such as now or may be hereafter chartered, shall respectively have and possess all the powers and privileges contained in this act, and they shall be subject to all the duties, liabilities, and provisions not inconsistent with the provisions of their charter contained in this act."

Among the privileges referred to in this section are those contained in section 29 of the same act (*R. C.* 1855, 425), which provides that such company may

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“take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance, and accommodation of its railroad, but the real estate received by voluntary grant shall be held and used for the purpose of such grant only.” It may also “purchase, hold, and use all such real estate and other property as may be necessary for the construction and maintenance of its railroad, and the stations and other accommodations necessary to accomplish the object of its incorporation.”

From these enactments it is evident to my mind, that it was the intention of the legislature to invest the Pacific Railroad Company with power to take two classes of real estate; one class it had the right to receive and dispose of at pleasure, for the purpose of aiding in the construction of its road, or for raising funds to pay debts contracted in its construction, &c.; the other class it can hold only for depots, road-beds, &c. The history of the country shows that this is the proper construction of the acts referred to. From the time the charter was granted, donations of real estate to aid in its construction have been made all along the line of the road, and titles have been acquired and investments made on the faith of this being the proper construction of the charter. It is true that this company, like all other corporations, is subject to all the limitations expressed in the charter, but the charter and the laws above referred to expressly authorize grants of land to be made to aid in the construction of the road.

The state considered this railroad company able to receive the lands denoted by Congress without any enlargement of its charter, and accordingly made the grant to aid in the construction of the main trunk line to the bifurcation of the southwest branch, and from that point to apply the lands to the southwest branch.

Although this railroad company may receive grants of land, and sell and dispose of the same for the pur-

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poses of its construction and payment of its debts, &c., it can not become a large landed proprietor for purposes not connected with its creation. But the amount of lands it may receive can not be decided between these parties; conceding the power to receive lands for the purposes aforesaid, no one, except the state, can raise the question as to the amount that may be received. This was decided by this court in the case of *Chambers v. St. Louis*, 29 *Mo.* 576-7; also by the supreme court of the United States in the case of *Meyer v. Croft*, reported in the May number of the *Law Reg.* for 1872; see also to the same effect, *Smith v. Shely*, 12 *Wall.*, 353, decided by the supreme court of the United States at the December term, 1871.

SCOTT, J., in *Chambers v. St. Louis*, says, delivering the opinion of the court: "There being a right in the city to take and hold lands, if there is a capacity in the vendor to convey, so soon as the conveyance is made there is a complete sale; and if the corporation, in purchasing, violates or abuses the power to do so, that is no concern of the vendor or his heirs. It is a matter between the state and the city."

So this question can arise only in a direct proceeding by the state against the Pacific Railroad Company, and not in a collateral proceeding like this. The case of *Pacific R. R. Co. v. Seeley*, 45 *Mo.* 212, was a suit in equity for the specific conveyance of lands, and not an executed conveyance. That case went off on the ground that the contract in question upon its face showed that it was against public policy. The petition was demurred to and the demurrer was sustained by the circuit court, and this judgment of the circuit court was properly affirmed by this court, on the ground that the contract was void as being against public policy.

There is a manifest distinction between executory and executed contracts. While a party may not be

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compelled by a court of equity to carry a contract into specific execution, yet if he should voluntarily make a deed, it will be good to pass all his title.

The case of *State v. Mansfield*, 3 *Zabr. (N. J.)* 510, so strongly relied on by the counsel for appellants, is not in conflict with any of the doctrines here laid down. In that case the Camden & Amboy Railroad and Transportation Company claimed that certain real estate consisting of houses and lots owned by that company and let by them to their workmen and employees, were exempt from taxation under a clause in their charter exempting the company "from all further taxation." The court held that this property was liable to taxation, while the road-bed, turn-outs, etc., were exempt, thereby holding that there were two classes of real estate which the company had the power to acquire and hold, the one being liable to taxation and the other exempt. The same doctrine was maintained in Massachusetts in the case of *Inhabitants of Worcester v. Wilson R. R. Corp.*, 4 *Metc.* 564, which is looked upon as a well-considered case. See also *Whitehead v. Vineyard*, *post*, p. 7.

Under the view we take of this case, the judgment must be affirmed.

All concur.

Judgment affirmed.

Whitehead v. Vineyard.

WHITEHEAD v. VINEYARD.

50 *Missouri*, 80.*Supreme Court of Missouri; March Term, 1872.*

Lands.—Deeds. Where the charter of a railway company authorizes the company to “take, hold, use, possess, and enjoy lands, and the same to sell and dispose of at pleasure,” although this power should be held subordinate to the general objects of the corporation, yet a conveyance by the company of lands purchased by it, and not necessary to its use, will pass title.

Lands.—Lien. A lien upon the lands of a railway company in favor of the state, created by statute, may embrace lands acquired by the company after the creation of the lien, if such is the legislative intention.

Error from the supreme court of Missouri to the second district court.

This was an action of ejectment to recover possession of certain lands held by the defendant, claiming title under and through the Iron Mountain Railroad Company. The facts in the case and the questions arising upon them, appear in the opinion of the court. A judgment in the circuit court in favor of the plaintiff, was reversed by the district court, and the cause remanded; and from the latter judgment the plaintiff appealed.

Perryman & Dinning, for the plaintiff in error.

Dryden & Dryden, with *J. L. Thomas*, for the defendant in error.

BLISS, J.—The plaintiff brings ejectment, and claims title through Thos. Allen, who held the property as

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having belonged to the Iron Mountain Railroad Company. It is not disputed that the plaintiff established his right to the land, provided the railroad company had a right to purchase and hold the same, and provided it was included in the lien held by the state upon its property, and sold to said Allen when the state sold out the road. The district court, in reversing the judgment of the circuit court, held the affirmative of these propositions, and they are the only questions presented for our review.

1. Section 1 of the charter provides that the company "may take, hold, use, possess and enjoy the fee-simple, or any other title or estate, in any lands, tenements, or hereditaments, and the same to sell and dispose of at pleasure," &c. (*Sess. Acts*, 1850-51, 479, and *R. R. Laws*, 40; see also act of 1864, in *Sess. Acts* 1863-4, 382, authorizing the company to sell or lease its lands not needed for the use of the roads.) It may be conceded that this power to hold and sell real estate should be held to be subordinate to the general objects of the corporation; still it is sufficient to pass title, and we need not now inquire further.

Upon the second inquiry, it is evident that the legislature intended that the state should hold a lien upon all the property of the company, and that when it was foreclosed and the railroad sold out, and the title confirmed in said Allen, the sale was understood to cover everything which the company owned. To this view it is objected:

First. That the company did not own the land in dispute when the lien was created by statute, and that, therefore, it could not attach. True, the land was an after-purchase, but the inference is a *non sequitur*. If this was a sound view all the state liens for advances to build railroads would have been lost. In every instance it was to take effect upon prospective property, and such was the contract between the state and the

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respective companies who have been aided. This lien, for whatever it covered, was created by statutory contract referring to after-acquired property, and the statutory foreclosure afterwards made was expressly provided for by the acts under which the obligation was created. It is analogous to a mortgage of property not *in esse*, but which can be reached in equity.

As to such property, STORY, J., in *Mitchell v. Winslow* (2 *Story*, 639), says that courts of equity "support assignments, not only of choses in action, but of contingent interests and expectancies, and also of things which have no present, actual, or potential existence, but rest in mere possibility only. In respect to the latter, it is true that the assignment can have no positive operation to transfer *in presenti* property and things not *in esse*, but it operates by way of present contract, to take effect and attach to the things assigned when and as soon as they come *in esse*, and it may be enforced as such a contract *in rem* in equity." The controversy usually arises between the mortgagee and other creditors; and when there is no fraud, pledges of property not yet acquired have been uniformly sustained, as is shown in cases cited by counsel.

But the question is important in the present case only as showing the intention of the legislature; for if the several acts bearing upon the subject show that after-acquired property was intended to be embraced in the lien of the state, this objection falls to the ground. The legislative intention constitutes the law, and the law governs the lien.

It is urged, secondly, that this land was not included in the lien and sale because not covered by the statute. The first act, authorizing the loan of the credit of the state to the St. Louis & Iron Mountain Railroad Company, was passed December 25, 1852, and for the terms and conditions of the loan it referred to

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the act of February 22, 1851, "to expedite the construction of the Pacific and Hannibal & St. Joseph Railroads" (*R. R. Laws*, 109-10). The act to which reference is thus made (*R. R. Laws*, 60-63) provides (section 4) that the certificate of the acceptance of the state bonds shall operate as a mortgage of the road of the company, "and every part and section thereof and its appurtenances," and also (section 11), in case of default, that the governor shall "sell their road and its appurtenances by auction." Afterwards (December 10, 1855), the state, in "An act to secure the completion of certain railroads in this state," granted, by section 4, more bonds to this company, "upon the condition of a first lien or mortgage as contained and reserved in the act of February 22, 1851" (*R. R. Laws*, 73, 84, § 2). Again, on March 3, 1857, an amendment to the last-mentioned act was made for the relief of the railroad companies therein named, including the Iron Mountain Railroad Company, by which they were required to file a certificate accepting its terms and providing (section 17) that "all bonds issued under the provisions of this act shall constitute a first lien or mortgage upon the road and property of the several companies so receiving them, in the same manner as provided by the act approved February 22, 1851."

Under the provisions of these acts and subsequent legislation the railroad was sold out, and defendant claims that the land in controversy could not have been sold because not included in the term "appurtenances" used in the act of February 22, 1851; that land outside of and not necessary to the use of the road is not appurtenant to it. It becomes unnecessary in this case to consider how much would be included in the term, had not the legislative intention been otherwise made clear. Were we compelled to go into the questions it might become necessary to inquire into the object for which the land was acquired, whether it must be held sub-

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ordinate to or might be acquired independent of the only object of the organization. But the act of March 7, 1857, giving further aid to the several railroad companies, and which was expressly accepted by them, not content with the term "appurtenances," uses the more unambiguous and sweeping phrase "the road and property of the several companies," &c., unequivocally showing the intention to cover by the lien of the state all the corporate property of the companies named in the act. Subsequent acts expressly refer to and cover land like that in controversy, and leave the legislative intention without a shadow of doubt. The act of February 15, 1864 (*Sess. Acts*, 1863-4, 382), authorizes the St. Louis & Iron Mountain Railroad Company to sell and loan its lands not needed for the use and purposes of the road, and provides that their proceeds shall be paid into the state treasury on account of the interest due upon state bonds, and that the lien of the state upon such lands shall cease. Also the act of February 19, 1866 (*Sess. Acts*, 1865-6, 107, § 6), provides that in the sale of the respective railroads the commissioners shall "award the roads, and every part and section thereof, their franchises and appurtenances, and all lands and other property, real and personal, to the highest and best bidders," &c.

This land, therefore, was included in the lien held by the state upon the property of the St. Louis & Iron Mountain Railroad Company, and passed by its sale as provided in the last mentioned act.

The judgment of the district court, reversing that of the circuit court and remanding the cause, is affirmed.

All concur.

Judgment affirmed.

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ELLS v. THE PACIFIC RAILROAD

51 *Missouri*, 200.*Supreme Court of Missouri; January Term, 1873.*

Lands.—Proceedings to condemn. Proceedings for the condemnation of land for railway purposes allowed by statute, being in derogation of common law and common right, must be strictly pursued in order to give validity; and unless the record affirmatively show that every essential pre-requisite of the statute conferring the authority has been complied with, the proceeding is void.

Thus, where the refusal of the owner to relinquish his land is made, by statute, a pre-requisite to proceedings for condemnation, such refusal is a jurisdictional fact; and if that fact is not shown affirmatively by the record, judgment of condemnation is void.

Appeal to the supreme court of Missouri from the circuit court of Cooper county.

This was an action of ejectment to recover possession of certain lands held by defendant as lessee of the Osage Valley and Southern Kansas Railroad Company. The title of the latter company, and the other circumstances of the case, are fully stated in the opinion. Judgment was rendered for the plaintiff; from which the defendant appealed.

Hayden and Tompkins, for the respondents.

SHERWOOD, J.—This is an action of ejectment brought in the Cooper circuit court, by Ells and wife against the Pacific Railroad, to recover possession of the south part of lot 167 in the city of Boonville.

Both parties claim under James H. Lucas as the common source of title.

The answer of defendant, after a plea of the general issue, sets up an alleged equitable defense, to the

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effect that the whole of lot 167 had been purchased of James H. Lucas and Anne L. Hunt, for five hundred dollars, by the Osage Valley and Southern Kansas Railroad Company, during the pending of proceedings on the part of said company, as early as September, 1868, to have said lot condemned for a depot, and that under such purchase and with the knowledge of Ells, the plaintiff, who is charged in the answer to have been the agent of Lucas and Hunt in making the contract, the O. V. and S. K. R. R. Co., took possession of said lot and erected valuable and lasting improvements, &c.; that defendant is the lessee of said O. V. and S. K. Co.; that Lucas was notified in writing of these proceedings to condemn, that the purchase money had been offered to Ells, the agent, but neither Lucas nor Ells had made or caused to be made a deed for said lot.

There was a reply to this answer which denied its chief allegations, but failed to deny, however, that Lucas was notified in writing of the proceedings to condemn, or that the purchase money was offered to be paid.

Upon the trial of the cause by the court, the defendant, in order to support the plea of the general issue, read in evidence the judgment of condemnation of the whole of lot 167, in favor of the O. V. and S. K. R. R. Co. and against James H. Lucas. That judgment (which is without date, but purports to have been rendered by the Cooper circuit court), is in these words:

“Osage Valley and Southern Kansas Railroad Company
against
James H. Lucas.

“Now at this day this case coming on to be heard, the same is submitted to the court on the petition of plaintiffs, and proofs, and the court being satisfied that notice of this proceeding was duly served on said de-

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fendant, and that the commissioners appointed for that purpose have discharged their duty according to law, in viewing the lot through which the railroad of plaintiff passes, and that said commissioners have filed their report and plat, in the office of the clerk of this court, and no valid objection appearing to said report, the same is now here approved, and judgment is hereby rendered against said company, and in favor of said defendant, James H. Lucas, for the amount of damage, and the value of said lot assessed therein in said report, viz.; five hundred dollars, and all costs of the proceeding, and an order and decree is now here made and rendered by this court, vesting in said company and their successors and assigns forever, the fee simple title of the lot in said plat and report described as follows: viz., lot 167 fronting ninety feet on Morgan-street and one hundred and fifty feet along Second-street, and is situated north of Morgan-street in the city of Boonville, county of Cooper, and through and over which said railroad passes; and which said title shall vest as aforesaid upon the payment of the said five hundred dollars to the said James H. Lucas."

The act incorporating the Osage Valley and Southern Kansas Railroad Company is found in the *Session Acts* of 1857, pp. 59 to 63 inclusive. Sections 9 and 10 of that act, point out the mode to be pursued for the condemnation of land. Section 9 provides, "If any owner of any tract of land, through which said railroad shall pass, shall refuse to relinquish the right of way for said road to said company, or the necessary lands for depots, engine or warehouses, water-stations, stopping-station or turn-outs, . . . the facts of the case shall be specifically stated to the judge of the circuit court of the county in which such lands are situated, and said judge shall appoint three disinterested citizens of the county in which such lands are situated to view said lands, who shall take into consideration the value

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of the land and advantages and disadvantages of the road to the same, and shall report under oath, what damages will be done the said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such judge shall be given to the owner of such lands, five days before such application shall be made, if such owner reside in this state," &c., &c., &c.

Section 10 provides: "The persons appointed to view and value such lands shall file their report and plat in the office of the clerk of the circuit court of the county in which the land or a part thereof is situated, and if no valid objection be made to said report, the court shall render verdict in favor of said owner and against such company for the amount of damages assessed, and shall make an order vesting in said company the fee simple title of the land in such plat and report described. Objections to such report must be filed within ten days after the same shall be filed," &c., &c.

It requires but a very cursory examination of this judgment, in connection with the provisions of the act above referred to, to see that several of the vitally essential requirements of the latter were utterly ignored if not willfully disregarded, in the proceeding to condemn the lot in question. In this statutory and summary proceeding, this legal *coup de main*, in derogation of common law and common right, the utmost strictness is required in order to give validity; and unless upon the *face of the proceeding* had, it *affirmatively appear* that every essential pre-requisite of the statute conferring the authority has been fully complied with, every step from inception to termination will be *coram non judice*.

Under the statute above mentioned, the refusal of the owner to relinquish is a jurisdictional fact; in the

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absence of which, even a court of general jurisdiction would be powerless by judgment of condemnation, to wrest property from its owner.

And authorities are not wanting either in point of numbers or respectability, which hold that *quoad* these summary proceedings, courts of general jurisdiction stand upon the same footing as those tribunals whose jurisdiction is special and limited. It follows as an inevitable sequence from these premises, that the judgment of condemnation was utterly worthless and could be of no avail as a matter of defense. See *Liud v. Clemens*, 44 *Mo.* 540; *Leslie v. St. Louis*, *Id.* 479; *Reitenbaugh v. Chester Valley R. R. Co.*, 21 *Pa. St.* 100.

In this view of the subject it becomes entirely unnecessary to examine into the correctness of the action of the court below, either in giving or refusing declarations of law, or in the admission of testimony.

As to the assessment of damages for the detention of the premises sued for, we see nothing in the record to warrant the belief that the court committed any error.

It only remains to consider the alleged equitable defense set up in defendant's answer; and of this it may be observed, that nothing therein contained would authorize a decree for specific performance; the rule being, that where an equity based upon part performance is set up as a defense, it must be done with that degree of fullness and precision required in a bill framed with a view to a decree for a specific performance. This the answer signally failed to do. It fails to state that possession was taken of the lot in question, and improvements made thereon, in *good faith*, and *solely* under the belief and expectation that the parol contract would be specifically performed; but on the contrary, the idea of reliance, in part at least, upon the proceedings to condemn, pervades the whole answer, else what

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need to state that proceedings for that purpose were instituted, or that Lucas was notified in writing, &c. ?

But even had the answer been in all respects formally sufficient, still the evidence would not have been of a character so *clear* and *forcible*, and in its nature so *positive* and *definite* as to warrant a court of equity in affording relief. 1 *Story Eq.* §§ 762, 763, 764, 770.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

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86 *Indiana*, 454.

Supreme Court of Indiana ; November Term, 1871.

Lands.—Proceedings to condemn.—Injunction. Where a statute authorizing the condemnation of land for railway purposes, requires that an offer be made to purchase the land from the owner before proceedings are taken for its condemnation, and also requires that the instrument of appropriation be filed, and a copy served on the owner of the land, the antecedent negotiation is not a jurisdictional fact which must appear on the face of the record in order to sustain a judgment of condemnation when questioned collaterally. Jurisdiction of the subject-matter is acquired by the filing of the instrument of appropriation, and of the person by the service of the copy; and the action of the court must be presumed to be right, and upon proof of the necessary facts, and can not be called in question in a collateral proceeding.

Hence, an injunction restraining the building of a railway over land which has been condemned under such a statute, can not be sustained merely because no attempt to purchase from the owner was made prior to the proceedings for condemnation.

Where, in such a case, the land owner has appeared in the proceed-

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ings to appropriate his property, filed exceptions to the assessment of damages, and taken an appeal therefrom, he has chosen his remedy; and he can not, while the appeal is pending, seek another, by injunction or otherwise

Appeal to the supreme court of Indiana from the circuit court of Allen county.

This was an action for trespass to real property, and for an injunction to restrain the defendant from constructing a railway over the plaintiff's land. The facts in the case and the questions involved are fully stated in the opinion. A temporary injunction was granted by the court below; and the defendant appealed.

W. H. Coombs, and *H. W. H. Miller*, for the appellant.

PETIT, J.—This was an action for trespass to land and for an injunction, by the appellee against the appellant. The answer of the appellant, which was sworn to, and the affidavits set out show the following state of facts:

The Fort Wayne, Muncie, & Cincinnati Railway Company, whose road runs through the lands of the appellee, on the 14th day of June, 1870, filed in the office of the clerk of the Allen circuit court, her map and profile of said line, and afterward, on the — day of June, 1870, filed in the office of said clerk, her instrument of appropriation, as required by section 15 of the railroad act (1 *Gav. & H.* 510), and, having served a copy thereof on the appellee, she, on the 23d day of June, 1870, applied to the Allen circuit court, then in session, for the appointment of appraisers. Three appraisers were duly appointed, who, under oath, fixed the damages of the appellee at two thousand dollars, their return being in writing and filed in the

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court. These damages were first tendered to the appellee, and afterward paid to the clerk.

Within the ten days allowed by law, the appellee filed his exceptions to the award, which have never been acted upon, but the cause is still pending in the Allen circuit court. The record of this case shows the appearance of the appellee in every stage of the proceedings. A copy of the entire record of these proceedings to appropriate is set out in the bill of exceptions.

The contract for the building of the road was let to the appellant, who immediately commenced work, which the appellee sought, by this action, to stop.

Upon the hearing for a temporary injunction, the appellant justifying under the railroad company, the appellee filed his affidavit denying that any attempt had been made by the company to purchase of him prior to condemning, and the judge, holding such negotiation to be a condition precedent, granted the injunction.

We think the judge erred, for the following reasons:

Aside from all questions of waiver by the appellee, which will be discussed hereafter, the proceedings of the circuit court for the condemnation of this right of way are not to be upset in this collateral way. If there is one thing which must be regarded as settled law in this state, it is that the proceedings of our courts of general jurisdiction, in relation to a subject-matter within that jurisdiction, can not be questioned collaterally. And this applies not only to those facts actually determined, but equally so to those which, being conditions precedent, the court should have determined before assuming to act in the premises.

The language of Mr. Justice FRAZER delivering the opinion of this court in the very thoroughly considered case of *Dequindre v. Williams* 31 *Ind.* 444, is directly in point. In that case the proceeding to appoint a guardian was *ex parte*. In that case, as in this, there

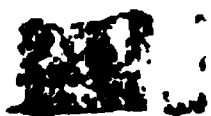
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was no written application on file alleging the jurisdictional facts; in that case certainly the residence of the minors in this state was quite as important a jurisdictional fact as an attempt to negotiate before proceedings to condemn in this case; yet it was held that inasmuch as the probate court had no right to appoint a guardian unless the minors were residents, therefore the court must be presumed to have passed upon that question; and although such finding was contrary to the facts, yet that error can not be shown in a collateral action.

Now, how is it in the case at bar? In our view, the antecedent negotiation is not a jurisdictional fact. "The power to hear and determine a cause is jurisdiction." *United States v. Arredondo*, 6 *Pet.* 709. "Any movement by a court is necessarily the exercise of jurisdiction." *Rhode Island v. Massachusetts*, 12 *Pet.* 718; *Dequindre v. Williams*, 31 *Ind.* 444. In this proceeding to condemn, there were just two jurisdictional facts, viz.: the filing of the instrument of appropriation, and the service of a copy thereof on the owner of the land; the former bringing the subject-matter, and the latter the person before the court.

These two facts being shown, the court was invested with jurisdiction; "the power to hear and determine the cause;" to appoint or refuse to appoint appraisers, according to the evidence.

The antecedent negotiation is no more a jurisdictional fact than a demand in a case where it is necessary to a recovery. A demand is in such case a condition precedent, because without it there is no right of action; yet no one would contend that a judgment for the plaintiff in such case, even in a justice's court, could be upset in a collateral action by showing that, in fact, no demand had been made. So, that a debt be due, is a condition precedent to a right of action upon it; but a judgment for such debt, in any court, before



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due, would not for that reason be void collaterally. Precisely so in the case at bar. The instrument of appropriation being filed, the copy served, and application made, it was then the duty of the court to hear evidence and grant or refuse the application; and the court having so acted and appointed the appraisers, the inevitable and unimpeachable presumption is that its action was right and upon proof of the necessary facts.

In the case of *Dequindre v. Williams* (*supra*), the residence of the minors in the state was admitted to be a jurisdictional fact lying at the very threshold of the proceeding; and yet the court say, "when the proceeding is of such a character that, before final action, the court should, from the nature of the case, ascertain whether it is such in fact that it has jurisdiction to act as it is invoked to do, and it does so act, the matter can not be questioned collaterally." See, also, *Green v. Beeson*, 31 *Ind.* 7; *Evansville, &c. R. R. Co. v. Evansville*, 15 *Ind.* 395; *Spaulding v. Baldwin*, 31 *Ind.* 376; *Church v. Northern Central Railway*, 45 *Pa. St.* 339; *Embury v. Conner*, 3 *N. Y.* 511; *Little Miami R. R. Co. v. Perrin*, 16 *Ohio*, 479; *Pullan v. Kinsinger*, 9 *Am. Law Reg. N. S.* 557. This last is a very elaborate opinion by EMMONS, United States circuit judge for the southern district of Ohio, in a case of much importance.

Nor will it do to say that the court in this case is exercising a special statutory power, and therefore to be executed strictly according to law to be valid.

This precise point was made and relied upon against the record of the probate court in the case of *Dequindre v. Williams* (*supra*), but the court, after stating that in this country the power to appoint guardians resides primarily in the legislature, say: "If then, the legislature chose to require that this authority should be exercised by a court of superior jurisdiction, the valid-

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ity of the record of such court, in a given case of the kind, must be tested by the rules ordinarily applicable to its records.”

Apply this language to the case in hand. In the language of the supreme court of Illinois, “the right of eminent domain, by which private property may be taken for public use, is an inherent sovereign power, and can be exercised *ad libitum* by making just compensation to the owner. . . . With this limitation, the manner in which it shall be exercised is in the discretion of the legislature.” *Johnson v. Joliet, &c. R. R. Co.*, 23 *Ill.* 202. In the same opinion it is held that the law is valid, though it provides for no notice to the owner, or for swearing the appraisers, or when their return shall be made.

In our state, the legislature, being thus invested with this sovereign power, has seen fit to require that this authority should be exercised by the circuit court; “and the validity of the record of such court in this case must be tested by the rules ordinarily applicable to its records.” But if it were admitted (and this is all that is ever claimed on this behalf), that a court, in the exercise of a statutory power, sits as an inferior court, and its records are tested by the rules applicable to the records of such courts; still, all that is required in such case is, that the record shall show the jurisdiction; and as it has already been shown that all of the jurisdictional facts in this proceeding to condemn appear affirmatively in the record, any objection on this score falls to the ground.

See *The Galena, &c. R. R. Co. v. Pound*, 22 *Ill.* 399. This case is directly in point, the statutes of that state and ours being similar on this point. *Ill. Rev. Stat.* 1869, 546.

The proceeding to condemn land under the fifteenth section of the railroad act is an adversary proceeding; the filing, the act of appropriation and service of a copy

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upon the owner of the land is notice to the party of the pendency of a suit. When this is done, the court may appoint appraisers. That the other party may appear at this stage of the proceedings, is shown by the seventeenth section, which requires the court to appoint some attorney to appear and protect the rights of absent or unknown owners, who have not appeared, &c. The appellee, as the owner of the land, had not only the right to appear and object to the appointment of the appraisers, or perhaps avail himself of any previous irregularity, if any existed; but the record shows that he did actually appear at every stage of the proceedings, and is, therefore, concluded by the record.

If, however, a doubt can arise as to the conclusive character of these proceedings to condemn the land, upon general principles, when attacked collaterally, the subsequent provisions of the statute providing for an appeal must remove it. Within ten days after the return of the award, either party may appear and file written exceptions to the award, "and the court shall take such order therein as right and justice may require, by ordering a new appraisement, on good cause shown; Provided, That notwithstanding such appeal, such company may take possession," &c., "and the subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." 1 *Gav. & H.* 511.

There can be no doubt that the legislature intended that a railroad company, which had in good faith proceeded under this act, so far as to have appraisers appointed, the damages assessed and tendered to the owner of the land, or paid to the clerk, should be protected in its possession of the property, and not be harassed by injunctions or other suits, especially after the owner of the land had appeared and filed exceptions to the report.

It will be observed that whatever exceptions have

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been taken to the award, the only thing the court can do is "to order a new appraisement on good cause shown," and the only question which can be afterwards tried in the cause is the amount of damages or compensation to be paid for the property.

By appearing and making no objection to the appointment of the appraisers, the appellee waved all previous irregularities; but, conceding that the proceedings in the circuit court would have been void for the want of jurisdiction, in case the appellee had not appeared, the most that can be claimed for him is that he had a choice of remedies, the common law remedy by action of trespass and injunction, or the statutory remedy by excepting to the award and taking his appeal.

By filing his exceptions within the time allowed by law, he has elected to take the statutory remedy, and must take it upon the terms prescribed by the statute, viz.: that no other questions than the amount of damages can be tried. The statute was before him, and when he elected to take this statutory remedy, he knew that nothing else could be done by the court than to order a new assessment, and that nothing else could be tried upon the appeal than the question of damages, and that pending such appeal the company might proceed with its work. As a party contracting with an assumed corporation is afterward estopped to deny its corporate character, so by taking this appeal the landowner estops himself as to every question except the amount of compensation.

If the proceedings on the appeal can only affect the amount of compensation to be allowed, it matters not how irregular the previous proceedings may have been in other respects; and if, notwithstanding, the company may take possession of the property, &c., how can the court deprive it of that right by injunction?

The appeal is still pending in the circuit court for

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trial. Suppose that case is tried, the damages reassessed and paid, what is to become of this case? Could the appellee still prosecute this suit to final judgment and recover damages? If not, the pendency of the former proceedings ought to bar this; else he can prosecute two suits for the same cause of action at the same time and in the same court.

The judge first grants an injunction on the ground that the proceedings pending in the Allen circuit court for the appropriation of the land were void for the want of jurisdiction, and then modifies his injunction so that it will operate only until the determination of the pending proceedings to condemn the land; thereby seeming to recognize such pending proceedings as the case in which the ultimate rights of the parties, that is, the amount of compensation, is to be determined.

Dyckman v. New York, 5 *N. Y.* 434, was an action of ejectment to recover land appropriated for the water-works. Judge GARDINER says (442): "These matters now insisted upon, as depriving the vice-chancellor of jurisdiction, were irregularities which could be and were waived by the voluntary appearance of the plaintiff." He also holds that the existence of such jurisdictional facts can not be controverted in a collateral action.

In *Little Miami R. R. Co. v. Perrin*, 16 *Ohio*, 479, it was held that when land had been entered upon by a company, valued under a judge's warrant, and an appeal taken to the common pleas from the assessment, it was error in the court to quash the proceedings; that though the warrant contain no statement of an attempt to purchase, or that the land was indispensable, &c., the common pleas had jurisdiction of the case on appeal.

This decision was under a statute similar to ours, giving an appeal from the valuation, and "the court, for good cause shown, may order a new valuation,"

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&c. This statute was held to imply what ours expresses, that no other question than the amount of damages should be tried.

In *Borland v. M. & M. R. R. Co.*, 8 *Iowa*, 148, it was held that upon an appeal from the assessment of damages to land taken by a railroad, nothing but the question of damages could be tried; that the appeal took the cause upon its merits, and it enabled them, in effect, to set right the consequences of any wrong-doing or partiality of the commissioners or sheriff. It became immaterial whether they had notice.

In *M. & M. R. R. Co. v. Rosseau*, 8 *Iowa*, 373, the court ordered certain exceptions to the award to be stricken out, for the reason that the cause on appeal was to be tried on its merits, and not upon exceptions taken to the action of the sheriff or jury, or the incompetency of either of them; that the appeal was from the assessment of the jury, and in the district court the only question is whether the owner is entitled to a greater amount than was awarded to him. But as it is urged that this exercise of the right of eminent domain being *strictissimi juris*, the statute must be exactly followed, the adjudications with reference to highways, involving the exercise of the same power, may shed some light on these questions.

The case of *Little v. Thompson*, 24 *Ind.* 146, was an appeal from an order of the board of commissioners opening a highway. The appellant, in the circuit court, attempted to controvert the sufficiency of the notice, and the court held that as to notice, as well as all other jurisdictional facts, no objection can be entertained in the circuit court, or even in the commissioners court after the appointment of the original viewers.

Again, in *Wright v. Wells*, 29 *Ind.* 354, which was another case of the same kind, the court cites approvingly the decision in *Little v. Thompson* (*supra*), and after holding as in that case, that objections of this kind

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must be made before the appointment of viewers in the first instance, it is further decided that only two questions can be litigated on such appeal, viz.: the utility of the proposed highway and the claim for damages. To the same effect is the case of *Kemp v. Smith*, 7 *Ind.* 471.

The statute above referred to says, that "subsequent proceedings on the appeal shall only affect the amount of compensation to be allowed." This provision is the law, or it is not. If it is not the law, it must be in consequence of its repugnance to the constitution, but no one has ventured to suggest any such objection. If, then, it is the law, and it has any meaning or effect at all, that meaning and effect is, that when a party files his exceptions to the award, and thereby takes his appeal, he has waived, and he is from that time estopped to raise or litigate any question except the amount of compensation. If such is not the effect, then this provision is a nullity; for, without it, if the proceedings were all regular, the appeal could only affect the amount of compensation. Legislation can change this law so as to make it mean something else, judicial interpretation never can. It is hardly necessary to add that, if such is the effect of this appeal in the original proceeding, the record is not less conclusive when attacked collaterally.

The appellee having appeared to the proceedings to appropriate his property for the use of the railroad company, filed his exceptions to the assessment of damages by the appraisers, and taken an appeal to the circuit court, he has chosen his line of action to redress his supposed wrong, and he can not, while that proceeding is pending, seek another remedy in any court, by injunction or otherwise. The decree granting an injunction is reversed, at the costs of the appellee, with instructions to the court below to dissolve the injunction and dismiss the complaint.

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WORDEN, Ch. J., having been of counsel, was absent.

Decree reversed.

GRAHAM v. THE CONNERSVILLE AND NEW
CASTLE JUNCTION RAILROAD COMPANY.

36 *Indiana*, 463.

Supreme Court of Indiana ; November Term, 1871.

Compensation for lands taken for railway purposes. Where a railway company has entered upon and occupied lands of a private individual, and has constructed its road and erected buildings thereon, without having acquired the right to do so, either by grant from the owner or by proceedings for the condemnation of the land, and afterwards proceeds legally to condemn and appropriate the land, the compensation to be awarded to the owner should be the value of the property at the time such proceedings are taken; not the value at the time when the company, without right or legal authority, took possession of it. And the value of the buildings erected and improvements made by the company should be included.

Appeal to the supreme court of Indiana from the court of common pleas of Wayne County.

This was a proceeding by the appellee, a railroad company, to acquire certain lands of the appellant for the purposes of its railroad. The history of the case and the questions involved are fully stated in the opinion.

W. S. Ballenger, for the appellant.

J. B. Julian, *J. F. Julian*, and *G. A. Johnson*, for the appellee.

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DOWNEY, J.—This was a proceeding to condemn and appropriate certain real estate of Graham to the use of the railroad company, instituted in the common pleas. The instrument of appropriation was filed in the clerk's office on June 3, 1867, and required the appellant to take notice that the railroad company had thereupon appropriated and then filed in the office of said clerk their instrument of appropriation of the following lots in Cambridge City, Wayne county, Indiana, to wit: lots 14, 15, 16, in block 17, west of the river, and south of the road, for the use of the railroad for tracks, road-bed, depot-buildings, and other purposes connected with said railroad. Appraisers were thereupon appointed by the judge of said court, after publication of notice to the appellant, who was a non-resident of the state.

The appraisers reported that on July 25, 1867, they made the appraisement, giving for lot 16, seventy-five dollars; for lot 15, fifty dollars; and for lot 14, forty dollars, being the damages to the appellant from the appropriation of said lots. They state that they "estimated the damages at the time the lots were occupied, about two years ago, by said company, and exclude any improvements since made by said company or other companies."

The appellant excepted to the award on the grounds, *first*, that the award was largely and grossly below the value of said lots at the time said commissioners estimated said damages, two years ago.

Second. The commissioners wrongfully and illegally estimated the damages accruing by reason of said appropriation at the time said company first took possession of said lots, to wit, two years ago, and not at the time said lots were legally appropriated by said company, to wit, at the time of the filing of said instrument of appropriation herein, in May, 1867, and the appraise-

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ment this day made, at which time only said appropriation was legally made.

Third. Said commissioners wrongfully and illegally excluded from their consideration the value of the improvements situated on said lots at the time said company commenced to legally appropriate the same, to wit, in May, 1867, which improvements are of the value of at least two thousand dollars, and said lots and improvements were at said time of the fair value of three thousand dollars.

Fourth. That the manner of appointment of said commissioners herein is illegal and wrongful, in this: that it directs said commissioners to estimate said damages at the time of the actual appropriation of said lots, which actual appropriation said commissioners contend is equivalent to actual occupation or possession of said lots by said company over two years ago.

Fifth. That said commissioners illegally and wrongfully excluded from their consideration the increased value of said lots arising from the construction of said company's road into said town.

Sixth. That on the — day of May, 1867, said company filed their instrument of appropriation of said lots in the Wayne common pleas court; that on July 13, 1867, said commissioners herein were by warrant of appointment to appraise the damages accruing by the appropriation made by said company, and that on July 25, 1867, said commissioners made their award in the premises, the amount of which said award has not been paid or tendered; that prior to the filing of said instrument of appropriation and the award thereafter made, and the payment of said award, which accrued at the time aforesaid, said company had no right or title, or color of title, to said lots; but the same were, until legally appropriated, the property of said Graham; yet said commissioners illegally fixed the damages arising from said appropriation, at the time,

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to wit, several years ago, when said company illegally took possession of said lots, and before they in any way sought to condemn said lots to the use of said company.

Seventh. That said lots when condemned and appropriated by said company were of the value of at least two thousand five hundred dollars; but said commissioners refused to estimate said damages at the time of said condemnation, and wrongfully estimated such damages at a time several years before such condemnation and appropriation. Wherefore he asked that said award be set aside, and for such further orders and proceedings in the premises as right and justice require.

Upon a general denial of these exceptions there was a trial by the court, which resulted in the following special finding: "The court having heard and duly considered the evidence, and seen and examined the papers in the cause, finds that in the spring of 1866, the defendant, George Graham, was the owner in fee simple of lots 14, 15, and 16, in block 17, west of the river, and south of the national road, in Cambridge City, Wayne county, Indiana; that said Graham had for the last forty years been a resident of Cincinnati, Ohio; that at said time there was upon said lots an embankment or road bed constructed by some railroad company, the name of which was not proven to the court, and that at the time aforesaid said plaintiff took possession of said embankment or road bed, and laid its track thereon; that said track ran diagonally through said lots from the northwest to the southeast; that in the fall following, that portion of said lots lying north of said track, and fronting north to the Columbus and Indianapolis Central Railway, was taken possession of by said plaintiff, and a depot and other buildings built thereon, and that said company is now in the possession thereof; that said defendant never gave his con-

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sent to the occupation or appropriation of said lots, and that said company took possession of and appropriated said lots without the knowledge or consent of said defendant; that said lots were worth, at the time they were taken possession of by said company, exclusive of any improvements afterward put upon them by said company, the sum of one hundred dollars.

It is therefore considered and adjudged by the court that said plaintiff do pay into court, for the use of said defendant, the said sum of one hundred dollars, and that when the said sum is so paid, by the said plaintiff, the title to said lots, numbers 14, 15, and 16, in block 17, west of the river and south of the national road, in Cambridge City, Wayne county, Indiana, shall vest in the said Connersville and New Castle Junction Railroad Company." Judgment for costs in favor of Graham. There was an exception to the special finding by Graham. He also moved the court for a new trial, for the following reasons: *First*, the finding of the court on the facts is contrary to the evidence; *second*, the conclusions of law drawn by the court from the facts found are contrary to law; *third*, error of the court in excluding answers to the questions numbered one to twelve, asked of Graham, Raymond, and Markle; *fourth*, in refusing to allow the damages for the lots in controversy to be assessed for the value of the same at the time of the trial, no compensation having been previously paid or tendered; *fifth*, error of the court in compelling said Graham to accept as the measure of his damages the value of the lots in controversy at the time said company illegally and wrongfully entered into possession of the same, in opposition to the will of said Graham, and several years before said company instituted any proceeding to appropriate the same; *sixth*, error of the court in the instruction given to the commissioners to assess the damages at the time the plaintiff took actual possession of the lots in con-

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troversy, instead of assessing the same at the time of assessment made. This motion was overruled, and to this ruling the defendant excepted. The evidence given on the trial is set out in a bill of exceptions in the record.

The errors assigned are: first, the giving of improper instructions to the appraisers; second, the improper assessment of the damages at the time the company wrongfully took possession of the lots, instead of at the time of the legal proceedings for the appropriation of the property; third, in excluding the value of the improvements on the lots, at the time of the legal appropriation, in estimating the damages; fourth, in excluding evidence offered; fifth, in overruling the defendant's motion for a new trial.

By the evidence excluded the defendant sought to prove the damages with reference to the value of the property at the time the company took legal steps to appropriate the same, June 3, 1867, by showing the value of the lots at that time, and also by showing the value of the lots and the improvements put on them by the company, consisting of a depot building, hotel, &c., at that date. This the court refused to allow. The answers to two or three questions will settle all the points of difference between the parties.

First. To what point of time should the inquiry with reference to the amount of damages relate? to the time when the company took possession of the lots, or to the time when the proceeding was legally commenced to condemn and appropriate the lots or the use of them?

Second. If the inquiry should relate to the time when the proceeding to appropriate the property was commenced, should the value of the improvements which the company had previously to that time put on the lots be included in estimating the damages?

Upon the first point we are clearly of the opinion

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that the inquiry should relate to the time when the company proceeded to appropriate the lots or the use of them, and not to the time when the company, without right or legal authority, took possession of them. It may be conceded that a railroad corporation has the right, without a previous assessment of damages, to enter upon lands belonging to another person, and make surveys with a view to a location of its road; but it can not be that such a company can legally go upon the lands of another and take and hold possession thereof, and construct its road and erect buildings thereon, without first having acquired the right to do so by grant, or by having the value thereof assessed and paying or tendering the amount of the assessment. Such illegal acts of going upon and holding possession of the land, and constructing its road, and erecting buildings thereon, can not change or impair the rights of the land-owner. It is contended that the defendant should have proceeded against the company to recover his damages immediately when the company took possession of the lots. We know of no rule of law which required him to do so. It was the plain duty of the company, if she could not otherwise acquire the right, to proceed to acquire the same by legal appropriation, before taking possession of the lots. *Constitution of Indiana*, art. 1, § 21; 1 *Gov. & H.* 509, § 25; *Graham v. Columbus, &c. R. Co.*, 27 *Ind.* 260. The position that the company may first take possession of the real estate of another person, and afterwards make that taking legal and rightful by having the damages assessed with reference to the time when the possession was taken, has no warrant in the constitution or laws of this state, whatever may have been the case under the first constitution, or whatever may be the rule in other states of the Union, where the exercise of the right of eminent domain is not restricted as it is in Indiana. With us it is plainly provided in the funda-

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mental law, that "no man's property shall be taken by law without just compensation ; nor, except in case of the state, without such compensation first assessed and tendered."

Having thus found that the railroad company took and has held the possession of the land without right, the next question is, who was the owner of the improvements made on the real estate while it was thus unlawfully held, and should they have been included in estimating the value of the lands in making the assessment? Where one, without right or authority, and in his own wrong, makes improvements on the lands of another, to whom do the improvements belong?

It is a maxim of law of great antiquity, that whatever is fixed to the realty is thereby made a part of the realty to which it adheres, and partakes of all its incidents and properties. By the mere act of annexation, a personal chattel immediately becomes part and parcel of the freehold itself. *Amos & Ferrard on Fixtures*, 9, and cases cited. The law with reference to the right to remove fixtures under certain circumstances constitutes an exception to this general rule. *Id.* 10 ; *Hill on Fixtures*, § 45.

One who, without license or right, and in his own wrong, has erected a building upon the lands of another, has no right to remove the same. *Washburn v. Sproat*, 16 *Mass.* 449.

Our statute with reference to the rights of occupying claimants so far modifies the ancient rule, that when an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon, and is afterwards, in the proper action, found not to be the rightful owner thereof, he may be compensated for his improvements. But this is allowed only in those cases where the party making the improvements had color of title, and made the improvements in good faith. 2 *Gov. & H.* 285, § 615.

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But this right has no foundation in the common law, and is wholly of statutory origin. *Chesround v. Cunningham*, 3 *Blackf.* 82. But for this statute, one who had in good faith made improvements on the lands of another under the belief that he was himself the owner of it, must lose the improvement, on a recovery from him of the land.

These principles applied to the case under consideration bring us, inevitably, to the conclusion, that if the railroad company, without having acquired the right to occupy the lands in question, in its own wrong erected buildings, &c., on the same, they were the property of Graham, and should have been included in estimating the value of the lands when the damages were assessed.

If this rule seems to savor of hardship, the company has no one to blame but itself, for not having avoided its application.

The judgment is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

Judgment reversed.

THE SAVANNAH AND THUNDERBOLT RAIL-
ROAD COMPANY v. THE CITY OF SAVAN-
NAH.

45 *Georgia*, 602.

Supreme Court of Georgia; January Term, 1872.

Eminent domain. Highways. The eminent domain of the state extends to streets and squares in a city dedicated to the public use; and the legislature may grant to a corporation the right to construct

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and operate a street railway through them without the consent of the authorities of the city.

A municipal corporation has no property in such streets and squares as will entitle it to pecuniary compensation for the additional servitude placed upon them. Nor can the corporate authorities maintain a suit for the benefit of residents along such streets and squares, to restrain the construction of the railway.

Error from the supreme court of Georgia to review a decision at chambers granting an injunction.

This was a bill in equity for an injunction to restrain the defendant from constructing a street railroad through certain streets and squares dedicated to the public use. Upon facts which appear in the opinion, an order to show cause why an injunction should not issue was granted. Upon the return of the order, defendant showed, for cause against the issue of the injunction, its act of incorporation authorizing the construction of the track. The judge decided that the act of incorporation was unconstitutional and void, and ordered an injunction to issue as prayed for. The defendant excepted.

Hartridge & Chisholm, for the plaintiff in error.

A. W. Hammond & Son, for the defendant in error.

MONTGOMERY, J.—The only question for the consideration of the court in this case is, has the legislature the power to grant to a street railway the right to run through the squares intersecting Abercorn-street, in Savannah, without the consent of the corporation, and without compensation to the city? The mayor and aldermen of Savannah hold the title to the streets, squares, lanes, &c., in trust for the “accustomed use of” the inhabitants of the city, under the act of May 1, 1760, and the acts amendatory thereof. 33 *Ga.* 614–616. “The corporation can not alien or grant the pub-

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lic property, for purposes *different from the object of its original appropriation.*" *Ib.* 615. And yet we will find that the corporation has diverted the squares of the city from the purposes of their original appropriation. The original purpose to which the squares were appropriated can only be found, so far as authorities at my command have enabled me to ascertain, in the second volume of the Georgia Historical Collections, pages 252-3, in a paper entitled, "A True and Historical Narrative of the Colony of Georgia; in America, by Patrick Tailfee (Telfair?), M. D., Hugh Anderson, M. A., D. A. Douglass and others, landholders in Georgia," &c., first printed for the authors by P. Timothy, at Charleston, in the year 1741. There we find that "the plan of the town was beautifully laid out in wards, tithings, and public squares, left at proper distances for markets and public buildings, the whole making an agreeable uniformity." Again: "A public mill for grinding corn was first erected at a considerable expense, in one square of the town; but, in about three years' time, without doing the least service, it fell to the ground. In another square of the town, a second was set up, at a far greater expense, but never finished; and is now erased, and converted into a house for entertaining Indians, and other such like uses." These, then, were the uses to which the squares were put, eight years after the foundation of the town, and nineteen years before the act of 1760. It is difficult to understand how the squares could have been used, either as markets or as mill-sites, without being traversed by vehicles of every description. And this must have been the "accustomed use," mentioned in the act of 1760, unless the use had changed within the nineteen years preceding the act, of which change I can find no record. When the squares were inclosed, and vehicles and horses excluded, some old ordinance of the city, not accessible to me may show.

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This brief historical retrospect shows that the original appropriation of the squares, at least, of those laid out at the foundation of the town, was not as parks, or of pleasure grounds; and, therefore, if there is any peculiar sanctity to be attached to dedications of that character (which is not conceded), the original squares of Savannah can not claim the benefit of it. I, therefore, find that in point of fact the squares were dedicated precisely as were the streets. Indeed, having been diverted without authority of the legislature from the original purposes of the dedication, the question might be raised as to whether the legislature might not compel, if they chose so to do, a return of the use of the same squares to those purposes—that is, to their use as thoroughfares. The charter of the plaintiffs in error does this to the extent of the permission granted to run one class of vehicles through them. It is not seriously questioned that as to the streets the legislature has not the right of eminent domain in them, which enables it to place an additional servitude upon them. The city of New York holds the title to the streets of that city, upon the same trusts and limitations that the city of Savannah holds the streets, squares, lanes and passages of that city, to wit: for the use of the public, “and not as corporate property.” “And the trust of the city being *publici juris*, it is under the unqualified control of the legislature; and any appropriation of it to public use by legislative authority is not a taking of private property, so as to require compensation to the city to render it constitutional.” *People v. Kerr*, 27 *N. Y.* 188. “I can not doubt that the power exists with the state legislature, without the consent or license of the municipal corporations, to so control the use of the public streets of the city as to authorize the construction of a railroad track therein, on which city passengers may be transported for hire.” *Ib.* 214. But it is said that the

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dedication of the squares to the public was a contract in which both the public and the individual lot owners along the squares have acquired vested rights.

The reply is, first, "All contracts are made subject to the right of eminent domain. A contract is, therefore, not violated by the exercise of the right." *West River Bridge Co. v. Dix*, 6 *How.* 507. Especially is this true as to incorporations for public purposes. *East Hartford v. Hartford Bridge Co.*, 10 *How.* 511. "It is, therefore clear that whatever in the nature of a contract could be considered to exist in such a case, by a grant to a town of some public privilege, there must be implied in it a condition that the power still remained, or was reserved in the legislature to modify or discontinue the privilege in future, as the public interests might, from time to time, appear to require." *East Hartford v. Hartford Bridge*, 10 *How.* 536. The appropriation of property to one public use by the legislature does not deprive it of putting an additional servitude thereon. *Boston Water Power Co. v. Boston, &c. R. R. Co.*, 23 *Pick.* 396-7; 1 *Redfield on Railways*, 260, note. Secondly, the mayor and aldermen of Savannah "can not get an injunction to restrain the running of a railroad on the ground of injury to lot owners along the line." *People v. Law*, 34 *Barb. (N. Y.)* 508. Again: "The laying of a railway upon the surface of a street, so that, except at the instant of the passing of a train, vehicles and horsemen and footmen may pass freely in and across the street," "does not materially interrupt the ordinary use of the street through which it is allowed to pass." "In that case the street remains, is open, free; in that case a new use is made of the street, without abridging its ancient use." *Savannah, &c. R. R. Co. v. Shields*, 33 *Ga.* 616; *Hamilton v. New York, &c. R. R. Co.*, 9 *Paige, (N. Y.) Ch.* 170. So that the *trust* interest, held by the mayor and aldermen of Savannah, is not damaged; and for injury to *private*

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interests, if there be any, the persons injured are the proper parties to complain.

Conceding, however, that the squares were originally dedicated as parks or pleasure grounds, rather than as "markets overt," as was then, and is, perhaps now, the custom in many parts of England, where "fairs and markets" are held, still, the power of the legislature to lay the additional servitude is indisputable. The case of *Wellington et al.*, petitioners, was an application for a *mandamus* to compel county commissioners to lay out a highway through a public park, set aside as such by act of the legislature, with privilege only to foot passengers to pass through. The court refused the *mandamus*, on the ground that the act had taken away the power from the commissioners, but says, "this decision does not involve the sovereign right of eminent domain or affect the power of the legislature to appropriate this property to other public uses, as public exigences may arise." 16 *Pick.* 105. Again, on page 104, the court says, "considering the power of the legislature (to appropriate the park to other public uses) undeniable, the question is, whether the act (setting aside the property as a park) by its terms and provisions, does supersede the power of the commissioners to lay out a highway over this common," &c. Once more, on page 103: "It is manifest that, in cases of rare occurrence, as that of a railroad or other similar work, if property could not be appropriated to public use by the legislature, it could not be done at all, because there is no provision by law for its being done in any other way. The right of the sovereign power of the state is incontestible. No other provision being made for its exercise, it is, therefore, necessarily vested in the legislature. Such is the present case, that of a public park, promenade, and place for military parade." See, also, 17 *Ga.* 60 and 61. Our judgment, therefore, is:

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1. The state has the same right of eminent domain over the streets and squares of Savannah, dedicated to the use of the inhabitants of the city, by act of 1760, and those since laid out upon the common, dedicated by that act to the same use, as it has over other territory of the state, and may lay an additional servitude upon such streets and squares by granting to a corporation the right to run a street railway, whose cars are drawn by animal power, through them, without the consent of the mayor and aldermen of the city.

2. The mayor and aldermen of the city of Savannah have no such property in the streets and squares of the city, under the act of 1760, or any act amendatory thereof, as entitles them to pecuniary compensation for the additional servitude, so placed upon the streets and squares by the legislature. Nor have they the right to an injunction restraining the construction of the railway for the benefit of the residents along such streets and squares. If such residents are damaged by the construction of the railway, they will be heard by the courts, upon a proper case made.

3. The act of December 11, 1871, authorizes the Savannah & Thunderbolt Company to run their railway through the squares, intersecting Abercorn-street.

Judgment reversed.

Southwestern R. R. Co. v. Screven.

THE SOUTHWESTERN RAILROAD COMPANY
v. SCREVEN.

45 Georgia, 618.

Supreme Court of Georgia; January Term, 1872.

Contracts.—Injunction. A certain railroad company, at great expense, graded a city street of width sufficient for two railroad tracks, upon the assurance from the authorities of the city that, should a certain other railroad company desire also to use the street, the city would require the latter company to pay to the former half the expense of grading. The first company having laid its track so as to leave one-half the space, the city granted to the other the right to use the street, provided the latter paid half the said expense to the former. *Held*, that a court of equity would restrain the city from changing the conditions of its grant, and directing the money to be paid into the city treasury, and would restrain such other company from paying the money to the city.

Error from the supreme court of Georgia to review a decision at chambers granting an injunction.

This was a bill in equity, filed by the complainant, Screven, as receiver of the Brunswick & Albany Railroad Company, against the Southwestern Railroad Company and the city of Albany, asking an injunction upon the following allegations :

That the Brunswick & Albany Railroad, having finished its line of track to the city of Albany, and being desirous of passing through that city westward, negotiated with said city a contract that the city surveyor should draw up specifications of the grading and other work, and if the Brunswick & Albany Railroad would comply therewith, that road should have the right of way through the city by way of North-street ;

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that the railroad complied with the conditions imposed on it; that in the negotiations it was expected that the Southwestern Railroad would desire to pass through North-street when its line was completed to Albany, and that it was understood and agreed that, before the right of way should be given by the city to the Southwestern Railroad, it should be required to pay to the Brunswick & Albany Railroad one-half of the expense incurred in grading, &c., on North-street; that the Brunswick & Albany Railroad was about to locate its track in the center of said street when it was appealed to by the Southwestern Railroad to place the track a proper distance south of the center, in order to leave room on the north side for another track; that the Brunswick & Albany Railroad complied with this request; that the Southwestern Railroad then applied to the city of Albany for permission to run through North-street, which was granted, conditioned upon its paying to the Brunswick & Albany Railroad one-half of the expense incurred in grading, as was agreed and understood between the city of Albany and the Brunswick & Albany Railroad; that the Southwestern Railroad is now laying its track through North-street; that the city of Albany, in violation of complainant's rights, has recently passed a resolution requiring the Southwestern Railroad to pay into the city treasury the half of the expense of the Brunswick & Albany Railroad in grading, &c., of North-street; that the Southwestern Railroad is colluding with the city of Albany, hoping to settle with said city for an inconsiderable sum, and in violation and fraud of the rights of complainant. An injunction was asked for to restrain the Southwestern Railroad from paying over said fund to the city of Albany, and the city of Albany from receiving it.

After notice and argument, the judge ordered the injunction to issue. The defendants excepted.

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Smith & Jones, Clark & Goss, and Vason & Davis,
for the plaintiffs in error.

Nisbets & Jackson, and A. W. Hammond & Son,
for the defendant in error.

MCCAY, J.—It can hardly be disputed that this attempt of the city of Albany to alter its contract with the Brunswick & Albany Railroad is a wrong to that company. Whether the contract was one which could have been enforced as a contract, is not the question. After the Brunswick & Albany Road had acted on it, done the work under the eye of the city, it is too late for the city to say, our contract does not bind us.

The only question of any doubt is the right to the injunction. Were the Brunswick & Albany Railroad a solvent road, going on in its usual business, we might hesitate to interfere. But the Brunswick & Albany Railroad is in the hands of a court of equity, with all its rights; one of those rights is the right to the value of this work, which the Southwestern Road is to pay. We think its payment to the city of Albany would complicate the matter. In strict law they are the owners of the street, but they have transferred the equitable right to this money to the Brunswick & Albany Railroad. It is an equitable fund—a court of equity has a present possession of all its interests, and we think its jurisdiction is complete to stop the fund where it is.

Judgment affirmed.

Southern Pacific R. R. Co. v. Reed.

THE SOUTHERN PACIFIC RAILROAD COMPANY v. REED.

41 *California*, 256.

Supreme Court of California ; April Term, 1871.

Eminent domain.—Highways. Where a railroad company has procured the appropriation of a public street for its track, and damages therefor have been awarded and paid to the owners of land adjoining the street, they are entitled to further compensation for the damages resulting from the laying of another track in the street by a different railroad company.

The fact that the authorities of the city have granted to a railway company the right to lay its track in a public street does not preclude the owners of land adjoining the street from recovering compensation for damages from the construction of the railway in such street.

Appeal to the supreme court of California from the district court for the third judicial district, Santa Clara county.

This was a proceeding by the Southern Pacific Railroad Company to appropriate for its track lands used as a public street. The facts of the case are stated in the opinion. Judgment was rendered in the district court awarding damages to the owners of land adjoining, severally ; from which the railroad company appealed. .

Peckham & Payne, for the appellants.

S. O. Houghton, for the respondents.

CROCKETT, J.—This is an appeal by the Southern Pacific Railroad Company from a judgment awarding

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damages to each of the respondents, severally, for lands in the city of San Jose, taken by the appellant for the use of its railroad. The respondent, E. P. Reed, was the owner of a considerable tract, containing about thirty acres, within the corporate limits of the city, and in the year 1862 laid it out into lots and blocks, fronting on a street called Dame-street, which he opened and laid out through the property with a view to enhance its value. Subsequently, the Western Pacific Railroad Company obtained the right of way for its road through said street, and damages to the amount of three thousand dollars were awarded to said Reed and paid to him by said company; and thereupon the track of their road was laid in the center of said street, and has ever since continued to be used for the conveyance of freights and passengers. In 1868, the city authorities, by ordinance, granted to the Santa Clara and Pajaro Valley Railroad Company the right to lay their track through said street; but the right was not exercised, and the company assigned to the Southern Pacific Railroad Company whatever rights it acquired in this respect under the ordinance. The street is eighty feet wide, and the Southern Pacific Railroad Company has laid its track on one side of the street, as near to the track of the Western Pacific Company as could conveniently be done to permit of the safe passage of trains over the two roads. But there is left a very narrow space between the track of the Southern Pacific Railroad Company and the sidewalk—too narrow to allow the safe transit of teams and vehicles when trains are passing over that part of the road. In the present action the commissioners awarded to Reed damages to the amount of two thousand dollars, which award was confirmed by the court; and the company has appealed. The award is resisted on three grounds, to wit: *First*, that Reed has already been paid by the Western Pacific Railroad Company

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all the damages which he has sustained or to which he is entitled by reason of the use of the street for railroad purposes. *Second*, that, as assignee of the Santa Clara and Pajaro Valley Railroad Company, the Southern Pacific Railroad Company is authorized, by ordinance of the city, to lay its track through the street without the payment of damages to any one. *Third*, that the damages awarded are excessive, and not justified by the proofs. But neither of these grounds is tenable. If it be conceded that Reed dedicated the lands included in the street to public use as a highway for ordinary travel, with a view to enhance the value of his conterminous lands (and the evidence shows that it had that effect), it by no means results that his adjoining lands may not be greatly depreciated by devoting the street to railroad purposes—a purpose not contemplated by him when the street was opened. Taking this view of his rights, the court awarded to him three thousand dollars for the damages which he suffered by the location of the track of the Western Pacific Railroad Company through the street. But this gave to that company no title to the land, nor any interest in it, except a mere easement, consisting of a right of way over the street, in common with the general public. If private property was injured by the use and enjoyment of this easement by the company, the owners of it were entitled to a just compensation. But the damages paid to Reed by the Western Pacific Railroad Company were only those which he suffered from the location of the road of that company. But it by no means follows that the location of another railroad in the same street may not inflict additional, and perhaps much greater damage. A single railroad track in the center of a wide street may not very seriously obstruct ordinary travel; but another railroad track, by the side of the first, may so obstruct the street as almost to exclude it from use by teams and vehicles. It is too

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plain for discussion, that each succeeding railroad track laid through a public street tends to obstruct, in an additional degree, ordinary travel through it; and if the whole street be occupied with railroad tracks it would be comparatively useless as a highway for other purposes. If, therefore, Reed was damaged by the use of the street by the Southern Pacific Railroad Company, he was entitled to a just compensation. Nor can the company escape its liability for the damage on the ground that, as assignee of the Santa Clara and Pajaro Valley Railroad Company, it was authorized, by the ordinance, to lay its track through this street. Without the consent of the city authorities none of the streets of the city could be used for that purpose; but this consent, when obtained, in no wise touches the question of damages to private property on the line of the street. The right to a just compensation for the injuries inflicted on private property by the appropriation of the street to a public use, not contemplated when it was opened and dedicated as a highway for ordinary travel, is in nowise affected by the question whether the city authorities did or did not consent to such appropriation.

The two propositions have no just or necessary relation to each other; and the right to a just compensation in no degree depends upon or is affected by the fact that the city authorities did or did not consent to such use of the street. Nor can we disturb the award on the ground that the damages are excessive, and not justified by the evidence. On this point it would be sufficient to say that there is a substantial conflict in the evidence; but, giving proper weight to the judgment of the commissioners, we think the preponderance of the evidence is in favor of the award.

The views already expressed are decisive of the case of the respondent Seale. We discover no error in the award of damages to him. In respect to the case of

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the respondent James F. Reed, and his children, the appeal is frivolous. No plausible ground whatsoever is alleged why the award should be set aside, or is unjust.

Judgment affirmed as to the respondents Seale and E. P. Reed; and as to the respondent James F. Reed, and his children, it is affirmed with twenty per cent. damages.

THE WESTERN PACIFIC RAILROAD COMPANY v. KERR.

41 *California*, 489.

Supreme Court of California; April Term, 1871.

Eminent domain. Public lands. Congress has power to grant to a railroad company the right of way over public lands of the United States which are occupied by persons having the right to pre-empt such lands, but who have not perfected their right by the requisite proof and payment for the land.

The right of way granted by congress to the Central Pacific Railroad Company by act of July 1, 1862, became perfect, as against such pre-emptioners, upon the filing of the plat of the location of the railroad in the proper land office.

Appeal to the supreme court of California from the district court of the sixth judicial district, Sacramento county.

This was a proceeding by the appellant, as assignee of the right of way of the Central Pacific Railroad Company, to appropriate certain land on which the respondent was living, for its road. Commissioners were

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appointed, who assessed the value of the land to be taken, and the money was paid into court. Afterward, each of the parties filed a petition for leave to withdraw the money. The court ordered the money to be paid to Kerr, and the railroad company appealed from the order.

Robert Robinson and Lewis Ramage, for the appellant.

Henry Starr, for the respondent.

RHODES, Ch. J.—The respondent, Kerr, settled on the land in controversy, in 1854, with the intention of pre-empting it, and has ever since lived upon and improved it. In 1856 he filed his declaratory statement, but that was of no avail to him, as the township in which the land is situated was then unsurveyed. The township was afterward surveyed, and the township plat was filed in the land office at Sacramento, on February 20, 1868. Kerr filed a declaratory statement in that land office on May 13, 1868, and in due time proved up his pre-emption claim, paid the purchase money, and received his certificate of purchase. The plat and location of the railroad was filed in the land office on January 30, 1865. The question is, whether the respondent, Kerr, or the petitioner, the railroad company, is entitled to the money which, in the proceedings to acquire the right of way for the railroad, was paid into court on account of the right of way over this land.

The right of way over the public lands of the United States became perfect upon the filing of the plat of the location of the railroad in the proper land office. This right did not extend to a parcel of land in or to which a private person had acquired a title or interest, which he could maintain as against the United States.

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At the time the plat of the location of the road was filed, Kerr had not filed his declaratory statement. It was held by this court, in *Hutton v. Frisbie*, 37 *Cal.* 475, that congress has the power, at any time after a settler has settled upon and taken steps to acquire a pre-emption right to a tract of public land, but has not perfected his right by the payment of the price of the lands, to withdraw the lands from the operation of the pre-emption laws, and confer a right of entry upon another. The same doctrine was laid down by the supreme court of the United States in *Whitney v. Frisbie*, 9 *Wall.* 187. It follows that congress has the power, under similar circumstances, to grant to another the right of way over the lands, or any other right which is of less magnitude than the entire title, or the right to acquire the title by purchase.

But it is contended by Kerr, that under the provisions of the third and fourth sections of the act of congress of July 2, 1864, 13 *U. S. Stat.* 356, he is entitled to damages for the right of way for the railroad. The fourth section throws no light on the question. The lands therein mentioned are the alternate sections, which, with certain exceptions and reservations, were granted to the respective railroad companies. The third section provides that "in case the owner or claimant of such lands or premises and such company can not agree as to the damages [for the right of way over such lands], the amount shall be determined by the appraisal of three disinterested commissioners," &c. This section applies, in terms, to lands within the territories; but conceding that the provision is applicable to lands within the states, so far as the matter of compensation is concerned, the question arises whether the respondent comes within the provision. He was not the owner of the land at the time when the grant of the right of way took effect, nor was he the claimant, within the meaning of the act.

Selma, &c. R. R. Co. v. Camp.

A claimant is one having some interest in the land, which is recognized by the laws of the United States. One who has entered upon and improved a parcel of public land, without having taken a step toward the acquisition of the title, can not be regarded as the claimant of the land. His position in this respect is not strengthened by the fact that, after the filing of the plat of the location of the railroad, he became the purchaser of the land, because if he was not at that time the claimant of the land, the grant of the right of way over that land then took effect, and his purchase was subject to the right of way for the railroad.

SPRAGUE, J , did not express an opinion.

Judgment reversed, and cause remanded.

THE SELMA, ROME, & DALTON RAILROAD
COMPANY v. CAMP.

45 Georgia, 180.

Supreme Court of Georgia ; January Term, 1871.

Compensation for property damaged by construction of railway. In the assessment of damages to property from the construction and use of a railway, the measure of damages is the actual injury resulting directly from the invasion of the property. Loss of custom of a mill after the building of the railroad should not be included. Where proceedings for the assessment of damages for taking land of a private owner for the construction of a railway are originated by the railway company against one as the owner of the land, he, being thus recognized by the company, will not be required to prove his title to the land at the trial.

Selma, &c. R. R. Co. v. Camp.

Appeal to the supreme court of Georgia from the superior court of Floyd county.

This was a proceeding for assessment of damages to the defendant's land, caused by the construction of the plaintiff's railway. The facts are stated in the opinion. A verdict was rendered for the defendant, and a motion by the plaintiff for a new trial was overruled, and exception taken ; and the plaintiff appealed.

Printup & Fouché, for the plaintiff in error.

Wright & Featherston, for the defendant in error.

WARNER, Ch. J.—1. This case came before the court below on an appeal from the assessment of damages, under proceedings instituted by the Selma, Rome, & Dalton Railroad Company, under the provisions of the charter of the company, to ascertain the damage done to H. M. Camp, of the county of Floyd, by the location of the railroad on his land. On the trial, the jury found a verdict for five hundred dollars. A motion was made for a new trial, on the part of the railroad company, which was overruled, and the company excepted. The evidence is, that five acres of land was taken by the company, worth one hundred and twenty-five dollars ; the other damage done to his property is proved to have been two hundred and fifty dollars, making the entire actual damage sustained three hundred and seventy-five dollars. It is true that the plaintiff states that his mill, which is located on another tract, about two hundred yards from the railroad, was injured six hundred dollars, but in what manner the location of the road injured it is not stated, except the loss of custom, and that it cost him one thousand one hundred dollars, and he has sold it for four hundred dollars. Nelms, the miller, testifies,

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that the custom to the mill decreased about one-half after the railroad was built, and that Camp sold the mill before the road was finished, but after the grading and change of the mill-road. The damage done to the mill, for which the plaintiff is entitled to compensation, is the actual damage done to his property by the location and use of the road, resulting directly from an invasion of his property by the railroad company.

2. If the plaintiff had instituted a suit against the company for an invasion of his freehold estate, then he might have been required to prove a title to his land, but as the railroad company originated the proceedings against him, as the owner of the land, to assess the damages for the right of way, under their charter, and he being in possession of the land, and recognized by the company as the owner thereof, it was not incumbent on him to prove his title to the land at the trial. In the view which we take of this case, our judgment is, that the judgment of the court below should be reversed, unless the plaintiff shall consent to write off from the verdict the sum of one hundred and twenty-five dollars, so as to leave the sum of three hundred and seventy-five dollars as the amount of the verdict, and in the event he shall consent to do so, that the judgment be affirmed for that amount.

Let the judgment be entered accordingly.

Pittsburg, &c. R. Co. v. Rose.

THE PITTSBURG, VIRGINIA, & CHARLESTON
RAILWAY COMPANY v. ROSE.

Supreme Court of Pennsylvania; November Term,
1873.

Compensation for damages resulting from construction of railway. In the assessment of damages to real property caused by the construction of a railway, the decrease in the rental value of the property, or the impossibility of procuring constant tenants, arising from the inconveniences to which such tenants are subjected by reason of the construction of the railroad, may properly be considered.

In applying the rule that in such cases the measure of damages is the difference between the market value of the property before and after the construction of the railroad, the true test of the value of property is the opinion of witnesses in view of the location, productiveness, and the general selling price in the neighborhood.

In estimating the height of an embankment, the ties, with the ballasting and filling in between them, should be included as part of the embankment.

Improvements proposed to be made by the railway company, not connected with the completion of the road, are not to be considered in determining the compensation.

The fact that the owner of the property had built his house partly upon the public street does not preclude his recovering compensation for the part built on his own land.

Error from the supreme court of Pennsylvania to the court of common pleas of Allegheny county.

This was a proceeding for the assessment of damages to the petitioner's property, resulting from the construction of a railway upon the public street adjoining. Viewers were appointed, under the general railroad law of Pennsylvania, and from their report an appeal was taken to the common pleas. To review the judgment of that court, rendered upon trial before a jury,

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the railroad company prosecuted a writ of error from the supreme court, assigning certain errors in the charge to the jury, which appear from the opinion.

SHARSWOOD, J.—In the court below this was an appeal from a report of viewers appointed upon the petition of August Rose, to assess the damages to his property arising from the construction of their railroad by the plaintiffs in error. The road did not take any part of the petitioner's land, but was constructed along a public road or street in the (then) borough of Birmingham. The provision of the tenth section of the general railroad law, act of February 19, 1849, *Pamph. L. 83*, which relates to this controversy, is, "that whenever any company shall locate its road in and upon any street or alley in any city or borough, ample compensation shall be made to the owners of lots fronting upon such street or alley, for any damages they may sustain by reason of any excavation or embankment made in the construction of such road, to be ascertained as other damages are authorized to be ascertained by this act." That such an embankment was made directly in front of the petitioner's property, is not a fact in dispute, and the jury were confined by the learned judge below to the damages sustained in consequence of such embankment—a ruling which could not be a subject of complaint upon this writ of error. We will proceed to consider the several errors which have been assigned.

The first assignment is to the admission of the learned judge of evidence to show, that since the construction of the road there had been difficulty in renting the plaintiff's property, and that for a portion of the time it had remained uninhabited, it being impossible to procure tenants for the same. The objection raised to this offer was that it tended to the allowance of consequential damages, and because the only true

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measure of damages in law is the difference between the market value of the property before and after the location of the railroad, and this without reference to the purposes to which the property was applied before the building of the railroad, or the intention of its owners as to its future enjoyment. A further objection was made, because the plaintiff was not in law entitled to damages resulting from any excavations or embankments which did not change the established grade of the street, and no offer was made to show that the street in question had any established grade. These objections were overruled by the learned judge, and the testimony admitted. In this we think there was no error. Admitting the rule for the measure of damages, as stated, to be the correct one, there are many different ways by which the market value of property may be ascertained. It may be by the opinion of witnesses derived from actual sales in the neighborhood, but this certainly is not the only way. There may be a few or no such actual sales before and after the alleged injury upon which to found such opinion. Surely the decrease in the rental of the property, or the impossibility of procuring constant tenants, arising from the inconveniences to which such tenants are subjected from the injury complained of, is an element in determining the difference in the value, very proper to be submitted to the consideration of the jury. How far it had resulted from the embankment, and how far from other inconveniences caused by the construction of the road, excluded from the consideration of the jury in this case, was to be determined by them under the instruction of the court. The same objection would lie to direct evidence of the difference in market value. It was clearly not necessary for the plaintiff to show an established grade. It would follow that if a plaintiff had built his house upon a street which the borough had neglected or refused to grade, that he could recover no damages.

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It was for the defendants to show that there was an established grade, to which their road conformed, if the fact was so.

The second assignment of error is to the refusal of the learned judge to affirm the third point submitted by the defendants below. There was no error in this refusal. It asked the judge to charge, that in arriving at the value of plaintiff's property the jury are to inquire simply what the property would sell for at a fair open sale in the market, without reference to its being used for any particular purposes, and that the best evidence of market value is the price actually paid for land in that neighborhood, making due allowance for difference in position and improvement. Passing by the question whether the use to which a property has been applied, when that use is prevented or injured by the embankment, might not properly be considered, it is clear that the judge could not be required to instruct the jury that a sale of land in the neighborhood is the best evidence of market value. The selling price of land in the neighborhood is undoubtedly a test of the value. *Searle v. Lackawana & Bloomsburgh Railroad Company*, 9 *Casey*, 57; *East Pennsylvania Railroad Company v. Hiester*, 4 *Wright*, 53. But that is very different from the price paid for any particular property or properties. The true test is the opinion of witnesses in view of location, productiveness, and the general selling price in the vicinity. Market value depends upon the judgment of the community, and a consideration of particular sales would lead to collateral issues as numerous as the sales.

The third and fourth assignments may be disposed of together. When the plan of the borough of Birmingham was first offered, it was rejected by the learned judge, but this error, if it was one, was corrected, and the plan subsequently admitted. It is complained that the admission was restricted to the purpose of showing

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where the south line of Manor-street is and was when the plan was made. It is not easy to perceive for what other purpose it was competent. Whether the plaintiff's property was on or over the line, the plan was incompetent to show. That must be made out by other testimony. There was nothing in this ruling to prevent the defendants from offering such other testimony.

The fifth assignment is that the court affirmed the fourth point of the plaintiff below—that the jury might take into consideration the ties used by the defendants in the construction of their railway in front of the plaintiff's property, and the ballasting or filling in between the same. There was clearly no error in affirming this point. The ties and filling in were surely a part of the embankment, the height of which was just that much increased by them.

Nor was there any error in affirming the plaintiff's sixth point, as complained of in the sixth assignment. What the railway company might propose thereafter to do in the way of improvements, unconnected with the finishing of their railway, was clearly not a matter to be considered in determining the damages. The embankment was made and the railway finished. The company might or might not, according to their pleasure, carry out their proposed improvements, and if the damages were reduced on account of them, and the company should afterwards fail to carry them out, it is manifest that the plaintiff would be remediless.

As to the seventh assignment, it can not be contended, and has not been here, that the plaintiffs in error were entitled to an affirmance of their fifth point as it was presented. Had the learned judge simply refused to affirm it, no question could have been made about it. The plaintiff, by having built his house over the line of the street, did not thereby forfeit all claim to recover damages. All that could be claimed, was, that he was precluded from damages to so much of his

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building as had encroached upon the public highway. "The true rule," said the court, "is to estimate the damages to the property, houses and lots, taking and considering the houses to be on the proper line of the street." It is impossible that any reasonable jury could have construed this to be an instruction that in point of fact the houses were on the proper line. The main part of the evidence admitted and heard was as to the question of fact, what was the proper line of the street, and whether the houses were over it. The instruction, therefore, evidently was, if you believe that the houses did encroach upon the street, do not, as the defendants' point has stated, allow the plaintiff no damages at all, but only such as he would suffer if his houses were on the proper line.

The eighth assignment of error is in refusing to affirm the sixth point of the defendant below, that the map of Remington was conclusive of the line, and if the jury believed that the plaintiff's houses encroached on Manor-street, as defined by said map, the plaintiff could not recover any damages for injuries resulting to houses built on the street. Without inquiring whether the map in question was such an official plan as was sufficient to fix conclusively the line of the street as between the plaintiff and defendants, it is manifest that the point was too broad, as it did not distinguish between so much of the houses as encroached on the street, and so much as were within its line. A house is built on a street when it is built on the line of it, in common as well as legal language. There was no error, therefore, in this refusal.

Judgment affirmed.

California Pacific R. R. Co. v. Frisbie.

THE CALIFORNIA PACIFIC RAILROAD COMPANY v. FRISBIE.

41 *California*, 856.

Supreme Court of California; April Term, 1871.

Compensation for damages from construction of railway. Where, a statute authorizing the taking of land for the construction of a railway, requires the commissioners appointed to assess damages and benefits, to award as compensation the excess of the value of the land taken and the damages to that not taken over the benefits to the land not taken, including in the damages to land not taken the cost of necessary fencing, it is not a substantial error to assess the cost of fencing separately from the damages to the land not taken. Nor is it a substantial error to state the amount of the excess of damages to land not taken over the benefits thereto, without stating separately the amount of such damages and benefits.

Appeal to the supreme court of California from the district court of the seventh judicial district, Solano county.

This was a proceeding by the plaintiff to condemn the land of the defendant, Frisbie, and some fifty others, for the track of a railroad.

The opinion states the facts and questions arising in the case.

On the filing of the report of the commissioners, the plaintiff's attorney excepted to the same, and filed a bill of exceptions, which was settled by the court. The court confirmed the report, and entered judgment. The plaintiff appealed, without moving for a new trial.

Wm. S. Wells, for the appellant.

L. C. Hays, and *Pendegast & Stoney*, for the respondents.

CROCKETT, J.—We deem it unnecessary to decide whether the exceptions of the appellant to the report of the commissioners were made in such form that we could consider them on this appeal. But we think the exceptions to the report are purely technical, and that the appeal is devoid of merit. It is not alleged that any injustice has been done to the appellant, but only that the commissioners have not strictly pursued the statute in the mode of stating the result at which they arrived. It is objected, in respect to several of the respondents, that the commissioners ascertained and assessed: *First*, the value of the land taken; *Second*, the cost of the fencing which would be necessary; *Third*, that the benefits to the land not taken were equal to the damages to the land not taken; and, in one case, that the damages exceeded the benefits two hundred dollars; whereas, the appellant contends that the cost of fencing ought to have been included in the estimate of damage to the land not taken. The court understood the report to mean, in the cases first referred to, that the damage, exclusive of fencing, was equal to the benefits to the land not taken; and in the last case that the damage exceeded the benefits by two hundred dollars. In accordance with this view of the report, the court entered judgment in the first class of cases for the value of the land taken and the cost of the fencing; and in the other case, in addition thereto, for two hundred dollars, being the excess of damage over benefits to the land not taken. We think the court correctly construed the report, and entered the proper judgment. The statute, it is true, requires the commissioners, in assessing the damage to the land not taken, to include therein, as part of the damage, the cost of necessary fencing, and to deduct from the aggregate amount of damage the benefits to the land not taken, if the former shall exceed the latter. But there is no substantial error in stating the cost of fencing

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separately from the other damage, as was done in this case. The result, practically, is precisely the same as if the cost of fencing had been included as part of the damage, and the benefits had been deducted therefrom. In the case of two of the respondents, the commissioners reported, *first*, the value of the land taken ; and, *second*, that the damage to the remainder of the tract exceeded the benefits by a specified sum ; and it is claimed that they erred in not stating separately the gross amount of damages and benefits, and then subtracting the one from the other. But the statute apparently contemplates that the report need state only the results at which the commissioners arrived, and not the details by which the result was reached. It requires them to ascertain and assess, *first*, the value of the land taken ; *second*, the damages to the land not taken, including the cost of fencing ; *third*, the benefits to the land not taken ; *Stat.* 1867-8, 705 ; and provides that if the benefits are equal to the damages no damages shall be awarded ; but if less than the damages, then damages shall be awarded only for the excess. The commissioners in this case must of necessity have assessed the damages and benefits separately ; otherwise they could not have ascertained that the former exceeded the latter by a specified sum.

The statute requires them to append to their report all the evidence, together with their rulings and the exceptions thereto, in order that the court may be enabled to review their proceedings, and to determine whether their conclusions were justified by the facts.

In respect to damages and benefits, the only question of interest to the railroad company and to the land owner is, whether the benefits are equal to the damages ; and, if not, by how much do the latter exceed the former. The commissioners have answered this by stating the exact amount of the excess, which is a substantial compliance with the statute. If they

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erred in the amount, the court, with all the evidence before it, had the means of detecting the error.

TEMPLE, J., being disqualified, did not participate in the decision.

RHODES, J., did not express an opinion.

Judgment affirmed, with twenty per cent. damages.

McFADDEN v. JOHNSON.

*Supreme Court of Pennsylvania ; January Term,
1873.*

Compensation for damages resulting from construction of railway.

The right to compensation for damages caused by constructing a railway over land of a private owner is personal, and does not pass by a conveyance of the land.

Error from the supreme court of Pennsylvania to the court of common pleas of Allegheny county.

This was an action to recover a balance of purchase money of land, and for money received by the defendant as compensation for damages to the land, caused by a railway company entering upon and making excavations and embankments for the railway, before the sale of the land by the plaintiff to the defendant. Upon trial before a jury, judgment was rendered for the plaintiff for the balance of purchase money only ; and thereupon the plaintiff brought a writ of error.

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AGNEW, J.—The court below charged the jury that on all the evidence the plaintiff was not entitled to recover, except for the admitted balance of purchase money unpaid by the defendant. This was an error, the plaintiff having shown that she was the owner of the farm when the railroad company entered upon it, and made the cutting and filling for the railroad track, for which she claimed damages; and that this injury was done by the Pittsburg & Erie Railroad Company, before the road passed into the hands of the Atlantic & Great Western Railroad Company. The facts are clearly proved by a number of witnesses; among them was Mr. Mumford, a land surveyor, and a director of the Atlantic & Great Western Company, who, as a member of a committee to settle for damages and the right of way, had examined the ground. He testifies distinctly to the profile of the road through the cut and fill, the former thirty feet deep, and the latter twenty-five feet high, at their lowest and highest points respectively. This profile he testified showed the condition of the farm after the grading was done, and that it was the condition in which the Atlantic & Great Western Company took the road. The proof is equally clear, that Johnson, the defendant, settled with the company and received the damages, and this settlement comprised all that had been done upon this farm. The cause seems to have been tried and decided upon the principle, that unless Mrs. McFadden *reserved* her right to the damages, they passed by her sale of the farm to John Scott, who testifies that she did not reserve her right at the time of her sale to him, and that he also did not reserve the right at the time of his sale to Johnson. This was a manifest error; the reverse being true, that the damages did not pass either by the article or the deed, unless expressly conveyed. The damages for the injury done to the land while Mrs. McFadden was the owner, were clearly a personal

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claim, which did not run with the land. If the company entered unlawfully, the entry and work done upon the land was a trespass, and the right to recover damages could be enforced by a common law action. If the entry were lawful, the company acquired a right, for which the damages (so called) are a compensation, enforceable in the statutory mode given to assess it. *McClinton v. R. R. Co.*, 16 *P. F. Smith*, 409. In either case, *qua amque via data*, therefore, the right is personal, belonging to the owner of the land when the entry and injury took place, and could pass only by her assignment. In *Schuykill Navigation Co. v. Decket*, 2 *Wall.* 343, the very point is decided, that the damages do not pass by the deed. Chief Justice GIBSON saying: "To the parties proposed to be made defendants, it is a decisive objection that they have not title to the damages, which being in compensation of an injury in the nature of a trespass, could not pass by a conveyance of the land." The same principle will be found to be asserted and sustained in the following cases: *Hart v. Hucker*, 5 *Serg. & R.* 1; *Commonwealth v. Stephens*, 3 *Pa.* 509; *Reese v. Adams*, 16 *Serg. & R.* 40. Instead, therefore, of holding Mrs. McFadden to proof of a reservation of her claim to the damages, the defendant, Johnson, was bound to show that she had parted with her rights, which had become vested in him. Neither the articles with Scott, nor the deed to Johnson is exhibited; but it is to be presumed, if either contained a transfer, it would have been noticed.

Judgment reversed and a *venire facias de novo* awarded.

Powers v. Hurmert.

POWERS v. HURMERT.

51 *Missouri*, 186.*Supreme Court of Missouri; October Term, 1872.*

Compensation for land taken for railway purposes.—Trespass. Where proceedings have been taken by a railway company to acquire lands of a private individual for the purposes of its road, and the damages have been assessed and the commissioners' report filed, but before the payment of the compensation to the owner, an agent of the company enters upon and occupies the land without the consent of the owner, such act is a trespass, and the right of action of the land owner therefor is not waived by his subsequent acceptance of the amount awarded as compensation for the taking of the land.

Appeal to the supreme court of Missouri from the circuit court of Adair county.

This was an action of trespass brought before a justice of the peace, and taken by appeal to the circuit court of Adair county, where it was submitted and tried on the following agreed case :

“The parties agree to the following state of facts, viz.: that Richard L. Powers was the owner and possessor of the fence in controversy surrounding the land described in plaintiff's complaint on the — day of —, and that afterwards on the — day of —, the Quincy, Missouri, & Pacific Railroad Company filed their petition in the Adair county circuit court against the plaintiff herein and others, asking the condemnation of a strip of said land one hundred feet wide, and that commissioners be appointed to condemn and assess the damages occasioned to plaintiff by such condemnation. And that plaintiff appeared to said petition, and that the court appointed commissioners for said purpose,

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and that said commissioners on the — day of —, went on to the land and viewed the same, and that said commissioners filed their report in the office of the circuit clerk of Adair county, Mo., on the — day of —, and that said report of said commissioners assessed plaintiff's damages at the sum of two hundred dollars, and that defendant herein is a contractor for grading under said railroad company, and that after said report was filed, and before the payment of the damages assessed, the defendant herein voluntarily threw down and opened and left down and open, as is charged in plaintiff's complaint, the fence of plaintiff on said one hundred feet condemned by said commissioners, in grading the road of said company, to the plaintiff's damage of the sum of ten dollars, and that afterwards, on January 20, 1872, the said company deposited said two hundred dollars with the clerk of the circuit court of Adair county, Mo., and that afterwards on the — day of January, 1872, the plaintiff herein received said sum of money and gave receipt therefor."

The circuit court on this statement gave judgment for the plaintiff ; and the defendant appealed.

ADAMS, J. [After stating the facts].—The only question presented is whether the agreed case warrants the judgment. It is contended that the reception of the money allowed by the commissioners on the condemnation of the property was a waiver of the alleged trespass. It is agreed that the trespass was committed and the liability incurred before the condemnation was perfected by the payment of the money. It may be remarked that the taking of private property for public use is in the nature of a forced sale. The owner is compelled to part with his property at the price assessed. The whole proceeding is *in invitum* and he is forced to take the assessed price, *nolens volens*. So in accepting the price which is forced on him he agrees

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to nothing, and waives no previous right that may have accrued to him, nor does the condemnation relate back so as to justify a previous trespass. Relation is sometimes allowed to prevent injustice ; as when an attachment has been issued and levied without sufficient affidavit, and an amended affidavit is afterwards made, it will relate back, so as to uphold the attachment and justify the previous levy. But, in that case the right to the attachment and its levy existed at the time and only lacked the formality of a sufficient affidavit. The right to invade the plaintiff's property had no existence till the condemnation was completed by payment of the assessed price. See *Walther v. Warner*, 25 Mo. 277.

WAGNER, J., concurred.

BLISS, J., absent.

Judgment affirmed.

THE CITY OF COLUMBUS v. THE COLUMBUS
& SHELBY RAILROAD COMPANY.

37 *Indiana*, 294.

Supreme Court of Indiana ; November Term, 1871.

Abandonment of right of way. A railroad company which had acquired the right of way through certain streets of a city, subsequently transferred its right to another company, which took up the rails outside the city for a distance of a mile, transferred them to a new track around the city, and contracted with the owner of the land taken for such new track to procure a release from the former company to him of the land from which the track had been re-

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moved. The portion of the track within the city remained connected at one end with the main track of the latter company, and was used as a switch or side track. *Held*, that this was not an abandonment of the right of the former company to maintain a track through the streets of the city.

Appeal to the supreme court of Indiana from the court of common pleas of Bartholomew county.

This was an action for an injunction restraining the city of Columbus from removing the track of the plaintiff's railroad through that city, it having been declared a nuisance by the common council, and the city marshals directed to remove it. The facts in the case and the history of the action are stated in the opinion.

F. Winter, R. Hill, and G. W. Richardson, for the appellants.

S. Stansifer, T. A. Hendricks, and A. W. Hendricks, for the appellee.

DOWNEY, J.—This action was commenced by the appellee against the appellants, and its object was to obtain injunctive relief. The facts stated in the complaint, condensed as much as possible, are as follows: In 1853, the Columbus & Shelby Railroad Company was organized to construct a railroad from Columbus to Shelbyville. For the consideration of three hundred dollars, the town of Columbus granted to the railroad company the right of way from the road of the Madison & Indianapolis Company along and across the streets of the town, in the direction of Shelbyville; and under this grant the Columbus & Shelby Railroad Company constructed, and for many years used, its track. In 1862, the Madison & Indianapolis Railroad Company, having been sold, was reorganized as the Indianapolis & Madison Railroad Company. In

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1866, the Indianapolis & Madison Railroad Company and the Jeffersonville Railroad Company were consolidated, and became the Jeffersonville, Madison, & Indianapolis Railroad Company. Before this consolidation, a running arrangement had been made between the Indianapolis & Madison Railroad Company and the Columbus & Shelby Railroad Company, which arrangement was renewed and continued between the Jeffersonville, Madison, & Indianapolis Railroad Company and the Columbus & Shelby Railroad Company. In 1869, the Jeffersonville, Madison, & Indianapolis Railroad Company constructed a track of its own, diverging from the line of its road at a point further north, and intersecting the track of the Columbus & Shelby road at a point three-fourths of a mile northeast of Columbus, and, without the consent of the appellee, removed the rails from the track of appellee's road between the corporation line and said point of intersection, and put them down on said new track, and agreed with the owner of the land over which that part of said road ran to procure from appellee a release to him of the right of way. On October 14, 1869, the common council of the city of Columbus passed an ordinance, by which it declared the track of appellee over, along, and across said streets to be a nuisance, and directed the marshal of the city to remove the same, &c., if not taken up by the Jeffersonville, Madison, & Indianapolis Railroad Company within ten days, &c. There was a second paragraph of the complaint, but it need not be separately noticed.

The first step taken by the defendants was to move the court to require the plaintiff to make the complaint more specific. This motion was overruled, and this action of the court is assigned as error. But the question is not in the record. No bill of exceptions was filed, and we can not, therefore, know what were the grounds of the motion, or that it was not properly

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overruled. The defendants then answered by a general denial, which was afterward withdrawn ; and, second, as follows :

“ That appellee, in 1853, organized under the general law, and immediately thereafter procured a release of right of way over said streets, from the then town of Columbus, without consideration, and solely for their principal line of road, without any switch thereon, and to be so maintained by appellee ; that the road was so built and operated for some time, until an arrangement was made by appellee with the Madison & Indianapolis Railroad Company, whereby the entire management and control of the appellee's road passed into the hands of the Madison & Indianapolis Company, who, continually, until May 1, 1866, operated and controlled the same, the Columbus & Shelby Company, during said time, not participating at all therein, and running no trains thereon, but by the terms of said arrangement, transferred to said Madison & Indianapolis Company all right, power, and control over said road, with full power to make all changes in the line or route thereof, which said Columbus & Shelby Company possessed ; that on May 1, 1866, the Madison & Indianapolis Company and Jeffersonville Company consolidated, forming the Jeffersonville, Madison, & Indianapolis Company, which became the owner of all the rights, privileges, and franchises of said two companies, including said rights of said Indianapolis & Madison Company in said appellee's road ; that immediately after said consolidation, an arrangement was effected between appellee and said consolidated company, similar to the one existing with the Madison & Indianapolis Company, as above set forth, and giving like control to the consolidated company over appellee's road, which said Jeffersonville, Madison, & Indianapolis Company has ever since

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exercised, placing thereon their own rolling stock, making time tables, selling passenger tickets, contracting for freights, and keeping the track in repair, all in the name and by authority of the officers of the Jeffersonville, Madison, & Indianapolis Company; and under said arrangement and power of control, said Jeffersonville, Madison, & Indianapolis Company have removed switches and side tracks, and laid down others, removed and torn down depots, and built others, all to the exclusion of acts of management by appellee, and have also built a road from Shelbyville to Cambridge city; that in 1869, a new road was constructed so as to leave the old line of the Jeffersonville Railroad and connect with the Columbus & Shelby Railroad at a point northeast of Columbus, the particulars of which are shown substantially as set forth in the complaint and accompanying plat; that the new route, for a part of the way, ran over land of Francis T. Crump, son of Francis J., and, to secure the right of way over land of the son, an agreement was made with the father and son, by the Jeffersonville, Madison, & Indianapolis Company, to take up the old track through the father's land, and abandon and surrender their right of way therein; pursuant to which arrangement said Jeffersonville, Madison, & Indianapolis Company took up and removed the track and superstructure between the north line of Columbus and the point of intersection, and Francis J. Crump has taken possession thereof, and plowed and cultivated the same; that by said removal, a gap of about a mile has been made in appellee's road; that no trains have or can run over the original line since; that a portion of said road—about one-half of a mile long—is within the city limits of Columbus, entirely cut off from any portion of said road, which is being used as a switch or side track for the Indianapolis and Madison part of said consolidated road, and can be used for no other

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purpose without reconstructing said removed portion ; that it is, and long has been, the constant practice of said Jeffersonville, Madison, & Indianapolis Company to back or run trains of hogs and other freight, and permit them to stand on said track and street for a day at a time, to the great hindrance of passengers, and annoyance of citizens on said street, which is one of the most important in the city, closely built up on both sides with dwelling-houses ; that said track, if used as the main or principal track of appellee's road, would be but slightly inconvenient, as only two trains each way ever run over said road per day, but as now used, blocked up with cars and locomotives standing thereon, is a great annoyance and inconvenience ; that appellee has, at no time prior to this action, objected to or dissented from the act of said Jeffersonville, Madison, & Indianapolis Company in taking up said track, or making said arrangement with Crump for the surrender of said right of way, all which acts of removal and abandonment were with full knowledge and consent of said appellee and the officers who swore to the complaint, who are charged to be directors of appellee, and also with the knowledge of all other directors of appellee, who have never objected thereto, and also with the knowledge of the president and other managing agents thereof ; that with full knowledge of said change, and all acts aforesaid relating thereto, appellee fully ratified and confirmed the same."

There was a demurrer to this paragraph of the answer, for the reason that it did not state facts sufficient to constitute a defense to the action. This demurrer was sustained, and the defendants declining to amend, final judgment was rendered for the plaintiff, by which the defendants were enjoined from removing the said track, &c.

The second and third assignments of error are, that the court improperly overruled the demurrers of the

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defendants to the first and second paragraphs of the complaint. These demurrers are not in the record, and we can not, therefore, tell what objections they raised to the complaint, or whether they were correctly overruled or not. We must presume they were correctly overruled.

The only question properly presented to us is that relating to the action of the court in sustaining the demurrer to the second paragraph of the answer.

As this paragraph alleges that the acts done by the Jeffersonville, Madison, & Indianapolis Railroad Company were done "with the full knowledge and consent of the appellee," it only remains to be determined whether the alleged acts amount to an abandonment of the right of way of that part of the original track of the appellee which lies on, along, and across the streets of the city. The question is not whether the Jeffersonville, Madison, & Indianapolis Company has made an unauthorized use of the track by converting it into a switch, and by using it as a place to leave its cars to the obstruction of the streets and the annoyance of the citizens. This would hardly justify the tearing up of the track, whatever other remedy it might afford the injured parties.

Do the acts alleged in the second paragraph show an abandonment of the right of way? It is not claimed that the company has abandoned the use of that part of the track in question, but it is insisted that the taking up of the rails at a point outside of the city, the transferring of them to the new track, and the promise to procure a release of the right which the company had to the way from which the rails have been removed, thus making it for the present, at least, impossible to use the track, as it originally was, continuously from the Jeffersonville, Madison, & Indianapolis road to Shelbyville, on account of the gap thus made, and indicating by the agreement to procure a

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release of the right of way, an intention to make this arrangement permanent, is an implied abandonment, or operates as an abandonment, of the part in question. But it is urged by the appellee that the running arrangement with the Jeffersonville, Madison, & Indianapolis Company may, for aught that appears, at any time terminate this arrangement, and as that company owns the new tracks, that it may at once assert this right, and thus leave the appellee without any track on which to run its cars, so far as this part of its line is concerned.

It is the opinion of a majority of the court that the facts alleged in the second paragraph of the answer are not sufficient to show an abandonment of the right of way in the city, and that there was no error in sustaining the demurrer thereto.

Judgment affirmed, with costs.

**KELLINGER v. THE FORTY-SECOND-STREET
& GRAND-STREET FERRY RAIL-
ROAD COMPANY.**

50 *New York*, 206.

New York Court of Appeals; November Term, 1872.

Highways. Where the title in fee to the public streets in a city is in the corporation, and not in the owners of the land abutting upon the streets, such owners have an easement in the street in common with the whole people to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action.

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Hence, an action can not be maintained against a street railroad company merely on the ground that the defendant has laid its track in the street in front of the plaintiff's premises, so near the sidewalk that there is not sufficient space left for a carriage to stand, and that thereby the plaintiff and his family are incommoded in leaving and returning to his residence, and the rental value of the premises diminished; where it is not alleged that the plaintiff owns the fee of such street, nor that the defendant's track was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises and depreciate their rental value.

Appeal to the New York court of appeals from the general term of the supreme court in the first judicial department.

This was an action for damages to the plaintiff's property from the construction of a railway track by the defendant in the street in front of the plaintiff's premises, and for an injunction restraining the defendant from using such track.

The complaint alleged that the plaintiff was the owner of certain premises, in the city of New York, in the street in front of which defendant had laid its tracks; that one of such tracks was so near the sidewalk as to prevent the plaintiff's complete enjoyment of the use and occupation of such premises, which was his residence; that there was not sufficient space left between the track and the sidewalk to allow a carriage to be driven or to stand, and that he and his family were thereby prevented from leaving or returning to their residence without great risk; that the value of the premises was greatly impaired, and the rental diminished; and that the defendant's railroad was constructed without the consent of the plaintiff, and without any proceedings to acquire title to the part of the street occupied having been taken. Judgment was demanded for damages, and an injunction to restrain the defendant from using its track was also asked for.

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The defendant demurred, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

Edward Mackinley, for the appellant.

A grant by a public officer or body to a private party is to be interpreted in favor of the grantor and the public. *Mohawk B. Co. v. U. & S. R. R. Co.*, 6 *Paige*, 554.

Plaintiff has an easement in the street, of which he can not be deprived without consent or compensation. *Laws of 1860*, 211; 10 *Barb.* 367; 16 *N. Y.* 109; 1 *Sand.* 341; 7 *Barb.* 535, 551.

The construction of a railroad is an appropriation of a street for a purpose *dehors* that for which the fee was surrendered. 39 *N. Y.* 410, 411.

Any person who suffers a peculiar injury from a public nuisance may maintain an action. 27 *N. Y.* 193. This use of the street alleged in the complaint is a public nuisance. *Hart v. Mayor*, 3 *Paige*, 213, and 9 *Wend.* 571; *Wetmore v. Tracy*, 14 *Wend.* 250; *Stetson v. Faxon*, 19 *Pick.* 147; *Mosher v. U. & S. R. R. Co.*, 8 *Barb.* 427; 37 *Id.* 380; 7 *Id.* 516, 518, §§ 5, 9; 37 *Id.* 394, 399, 402, 403, 411, 412; 7 *Id.* 543.

Ingress and egress to and from real property are constitutional and natural rights that inherently surround the soil and ever attend upon its proprietorship. *First Baptist Church v. U. & S. R. R. Co.*, 6 *Barb.* 313; *First Baptist Church v. S. & T. R. R. Co.*, 5 *Id.* 79; *Drake v. Hud. R. R. R. Co.*, 7 *Id.* 508; *Mosher v. U. & S. R. R. Co.*, 8 *Id.* 427; *Chapman v. A. & S. R. R. Co.*, 10 *Id.* 360; *Fletcher v. A. & S. R. R. Co.*, 25 *Wend.* 462; *Waterloo v. A. & R. R. R. Co.*, 3 *Hill*, 567; *Renwick v. Morris*, 3 *Hill*, affirmed; 7 *Hill*, 575; *Peckham v. Henderson*, 27 *Barb.* 207; *Corning v. Louerre*, 6 *Johns. Ch.* 439; *Brown v. C. & S. R. Co.*, 12 *N. Y.* 486; *Doolittle v. Supt. Broöm Co.*,

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18 *Id.* 160 ; quoting and approving *Corning v. Louerre*, 6 *Johns. Ch.* 439 ; *Davis v. Mayor*, 14 *N. Y.* 506 ; *Williams v. N. Y. C. R. R. Co.*, 16 *Id.* 97 ; *Stetson v. Paxon*, 19 *Pick.* 250 ; 4 *Hill*, 76 ; 21 *Barb.* 409 ; 2 *Dutch. [N. J.]*, 148 ; *Broom's L. M.* 191, 351.

Moses Ely, for the respondent.

When a railroad company has acquired a right to lay its tracks through a street, it is not a nuisance, and is not liable for any consequential damage, unless guilty of misconduct or neglect. *Williams v. N. Y. C. R. R. Co.*, 16 *N. Y.* 97, 104 ; *Chapman v. A. & S. R. R. Co.*, 10 *Barb.* 360 ; *People v. Kerr*, 37 *Id.* 357 ; *S. C.*, 27 *N. Y.* 188.

CHURCH, Ch. J.—It is not alleged in the complaint that the plaintiff owns the fee of the street in front of his premises, nor that the track of the defendant's road was unnecessarily or negligently or willfully laid so near the sidewalk as to impair the use of his premises and depreciate its rental value.

We can not take judicial notice of the width of the street at that point, nor but that the track of the road was laid in the only available space vacant for that purpose. Nor is it alleged that the grade of the street has been changed, or that there is any physical obstruction to free access to the plaintiff's premises, or any practical difficulty in passing over the track. The gravamen of the action is that the defendant has laid the track of its road so near the sidewalk as not to leave sufficient space for a vehicle to stand, and that the plaintiff and his family are thereby incommoded in leaving and returning to their residence, and that the rental value of said premises is greatly depreciated. The action is based upon the idea that the easement in the street, which the plaintiff is entitled to, has been and is being interfered with, and that he is entitled to

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compensation for the injury occasioned by such interference and an injunction to restrain the defendant from using its railroad. The corporation of the city of New York has acquired by grant, dedication, or confiscation the title in fee to the land on which the streets are laid, but the title thus vested is held not as private property, but in trust for public use, and such as was acquired under the act of 1813 is by that act expressly declared to be held in trust for the purpose of maintaining public streets. In *People v. Kerr*, 27 *N. Y.* 188, this court held that the trust of the city was *publici juris*, held not for the benefit of the people of the city alone, but for the people of the whole state, as the agent of the state, and a part of its governmental machinery, and that consequently the absolute control and direction of the trust was in the legislature as the superior power; that legislative authority to construct a railroad on the surface of the streets without a change of grade was a legitimate exercise of the power of regulating public rights for public uses, and that the city was not entitled to compensation, because it had as a corporation no property which was appropriated.

It is not quite clear as to what was intended to be decided relative to the rights of abutting owners. The opinion of WRIGHT, J., which the case states was acquiesced in by a majority of the judges, affirms explicitly that such owners had no property, estate, or interest in the land forming the bed of the streets in front of their respective premises, to be protected by the constitutional limitation upon the right of eminent domain; that they had no reversionary right, and even if they had, it was only a possibility so limited as to be subsequent in enjoyment to a prior present ownership that might last forever, and was not property entitled to protection from appropriation by the will of the government, and that if it was, it had no

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appreciable value. Two of the judges queried whether such owners might not have some interest, independent of the rights which the public had acquired, to have free access to their premises, but thought that no such question was involved in the case.

We should feel bound to adhere to this decision, and its necessary legal results, even if we doubted its soundness, because large sums of money had been expended upon the faith of it, and in many obvious ways it has become a rule of property which should never be abrogated except for the most cogent reasons. It is, however, strenuously insisted by the plaintiff that the decision does not reach the point involved in this case. but I am unable to see why it does not. It clearly holds that the abutting owners had no property in the street which was taken for the railroad, for which they were entitled to compensation, and in this respect the case is distinguishable from *Williams v. N. Y. C. R. R. Co.*, 16 *N. Y.* 97; *Craig v. Rochester City & B. R. R. Co.*, 39 *N. Y.* 404, and other kindred cases which hold that the laying of a railroad in a street or highway is an additional burden to the easement which as *against the owners in fee* the public had previously acquired, and for which such owners were entitled to compensation. These decisions have no application when the fee as well as the easement is vested in the public. This distinction is expressly recognized in these cases. In the former, SELDEN, J., said: "No case is likely to arise in the city of New York which would be entitled to any weight in the decision of this question, for the reason that it is claimed, and apparently with much justice, that as to a large portion of the streets in that city the fee of the land, and not mere easement, is vested in the corporation." The railroad of the defendant is not, therefore, a public nuisance. It was authorized by the sovereign power of the government. If it had been a

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public nuisance, the adjoining proprietor being specially incommoded and injured, could maintain an action. 6 *Barb.* 313; 37 *Id.* 357, and cases there cited. The basis of his action would have been that he suffered a peculiar inconvenience not common to all the inhabitants of the state, resulting from the public wrong of obstructing the street. In this case the foundation of such an action is wanting, viz.: the unlawfulness of the act. It was authorized by law, and adjudged by this court to be for public use and within the uses to which the streets may be devoted. The fee being in the public, the legislative authority can lawfully consent to modify, regulate, or enlarge its use for the benefit of the public. If these positions are sound, the corporeal rights of property of the plaintiff have not been impaired. Neither his property nor any right of property has been taken from him or injured, and his injuries are referable to that class of incidental disadvantages to which he is subjected resulting from the lawful exercise of absolute power of control vested in the state, in connection with the title to the fee of the land. This, I think, necessarily results from the principles determined in *People v. Kerr, supra*.

The abutting owners have an easement in the street in common with the whole people to pass and repass, and also to have free access to their premises, but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action.

There are expressions in some of the opinions apparently favoring the idea that such an action may be maintained. It was said in *Drake v. Hudson R. R. Co.*, 7 *Barb.* 508, that for contingent and consequential injuries, the parties aggrieved are not entitled to compensation as for property taken for public use, but that an action will lie for such injuries. The force of this remark is spent in limiting it to the statement that such injuries are not a taking of property within

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the meaning of the constitution, without intending to define what injuries might be recovered for by an action, and this view is confirmed by another portion of the same opinion, in which it is said that adjoining owners have no exclusive right in the streets, but that all other citizens, including railroad companies, have equal rights, subject to the control of the public authorities. If this is so, there is no principle which will sustain an action for incidental injuries growing out of a lawful regulation by the public. When it is determined that a horse railroad is a public use of the street, the question is settled, that incidental inconveniences must be submitted to. They become merged in the superior interest of the public. The decision in *Fletcher v. Auburn & S. R. R. Co.*, 25 *Wend.* 462, is cited and relied upon by the plaintiff. There the defendants were authorized to build a railroad upon a line to be selected by themselves, and to cross public highways, by restoring them to their original usefulness. In crossing the highway near the plaintiff's premises, they raised an embankment, which obstructed free access and otherwise injured his property, and they were rightfully held liable for the damages. The power exercised in that case by the legislature was entirely unlike that exercised here.

In the first place, the fee of the highway was assumed to be in the adjoining owner, and the court held that the legislature had not and could not, without compensation, authorize the injury complained of, and that all that the legislature professed to do was to protect the defendants from prosecution by the public for obstructing the highway, leaving the rights of the plaintiff untouched. The authority was in no sense a regulation of the use of the highway, but a privilege granted free, as against the public only. Similar views are applicable to the case in 2 *Dutch.* 148. These and like cases are reconcilable with *People v. Kerr, supra*,

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upon the difference between the extent of the rights and powers of the public authorities, possessed and exercised in the different cases, although the expressions of judges may seem to conflict. It is conceded that the authority to lay a railroad in the streets in the city of New York is lawful without compensation or liability to adjoining owners, and yet the laying of such road even in the widest streets may be and often is a disadvantage and injury to the property adjoining the street, rendering it less accessible and desirable, and less valuable. If this action can be maintained, I see no reason why in all cases of inconvenience and injury a similar action might not lie. The principle would be the same, and the injury would be only a question of degree. Such a result would not only overthrow previous adjudications, but would unsettle rights of property to an incalculable amount, and inflict serious injury upon the public. But while we feel bound to hold that this action can not be maintained upon the allegations contained in the complaint, we do not intend to determine that there are no circumstances which will justify an action. All the authorities concur that an injury to private rights or property, committed through negligence or willful misconduct, even though in the pursuit of a lawful purpose, may be redressed by an action.

We are not called upon to determine what acts would amount to negligence so as to give a cause of action. That question is not before us.

The judgment in this case must be affirmed, with leave to the plaintiff to amend the complaint on payment of costs.

All concur.

Judgment accordingly.

South Carolina R. R. Co. v. Steiner.

THE SOUTH CAROLINA RAILROAD COMPANY
v. STEINER.

44 Georgia, 546.

Supreme Court of Georgia; July Term, 1871.

Highways. Damage to adjoining land from construction of railway.

The grant by the municipal authorities of the use of a city street, the fee of which is in the state, for a railroad operated by steam, although ratified by the legislature, does not preclude suits for damages against the railroad company by the owners of land abutting on such street.

The damages recoverable in such suits must be limited to actual damage, tangible and determinable. Apprehensions of the safety of children, the possibilities of sickness, losses in trade, or any fanciful or speculative disturbances should not be considered. But the actual depreciation of the value of property, not only from obstructions to access, but from noise, smoke, shaking of walls, and the like, which can be traced as effect to cause, may be inquired into.

Equity. Where several actions for damages are brought by the owners of property abutting on a city street, against a number of railroad companies occupying the street with their tracks, equity may take jurisdiction by bill in the nature of a bill of peace, and bring in all the parties, plaintiffs and defendants, and adjust their equities and several rights by one decree. The inquiry should cover not only past but future damages, so as to stop all further litigation about the same subject-matter, and operate as a complete investiture of the legal right in the railroad companies free from further claim of damages.

Appeal to the supreme court of Georgia from the superior court of Richmond county.

This was a bill in equity, in the nature of a bill of peace, filed by the South Carolina Railroad Company, the Georgia Railroad & Banking Company, the Central Railroad & Banking Company of Georgia, the Charlotte, Columbia, & Augusta Railroad Company as

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successor to all the rights and franchises of the Columbia and Augusta Railroad Company and the Augusta & Summerville Railroad Company, all corporations chartered by the state of Georgia, or recognized by its laws, against Henry H. Steiner and others and also against all others who might bring like suits to those hereinafter described.

The substance of the bill was as follows :

The complainants claimed the right, and were, and had been (the three first, actually, and last named by delegating its authority to others), since November 9, 1867, and the Charlotte, Columbia, & Augusta Railroad, since June 16, 1869, exercising a right, severally, but under like authority, to transport railroad trains for freight and passengers, drawn by locomotive steam-power over a certain railroad track in the city of Augusta, laid down in Washington-street, in said city, from Reynolds-street to Telfair-street, and thence to the Georgia Railroad passenger depot, and to the Central Railroad freight depot, save that the said Central Railroad & Banking Company say that they have run no trains north of Greene-street.

By a contract, under seal, between the city council of Augusta and the trustees of the academy of Richmond county, of the one part, and the South Carolina Railroad Company of the other, entered into on August 10, 1852, on certain terms therein shown, the said company was authorized to lay down a railroad track in the center of said Washington-street, from Reynolds to Watkins-street, and use the same for the transportation of freight by horse power; and said track was laid down in a short time thereafter.

On July 31, 1857, by another contract between the same parties and the Georgia Railroad & Banking Company, the said company was permitted to connect their said track with the track of the said Georgia Railroad, which was accordingly done. And on Jan-

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uary 19, 1867, under the ordinances of said city, of that date, said track was continued on Washington-street, southward, to connect with the Central Railroad track, by the Augusta & Summerville Railroad Company.

On November 7, 1867, an ordinance was adopted by said city council authorizing the use of steam power on said Washington-street, by the said Augusta & Summerville Railroad Company. And on March 13, 1868, by an ordinance, the said city council authorized the Augusta & Summerville Railroad Company to contract with the South Carolina Railroad Company for the use of the track of the latter company from Reynolds-street to the Georgia Railroad depot, which is the same track first before described; and, in pursuance thereof, on March 16, 1868, by a deed of lease and covenants entered into between the two said companies, the said track was leased to the said Augusta & Summerville Railroad Company during the terms of their charter, in consideration that said last named company would haul by steam the freight and passenger cars of the said South Carolina Railroad Company, between the depots of said company and the Georgia Railroad Company. And on March 2, 1868, an agreement, in writing, was entered into between the said Augusta & Summerville Railroad Company, and the said Central Railroad & Banking Company, by which the first named company agreed to transport the trains of the other between the depot of the Central Railroad and the other depots in said city. And on July 5, 1869, an agreement was entered into between said Augusta & Summerville Railroad Company and said Columbia & Augusta Railroad Company, by which the former company agreed to transport the trains of the latter between the several depots.

And on _____, 1868, by verbal contract between the said Augusta & Summerville Railroad Company

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and the Georgia Railroad & Banking Company, the said former company agreed, for a valuable consideration, to transport the trains of the latter company between the various depots, in like manner as with the other above named companies.

And, inasmuch as the said Augusta & Summerville Railroad Company was unprovided with locomotives and engine hands of its own, by an understanding between it and the several other companies, on terms satisfactory to them, the transportation agreed to be drawn by said contracts has been actually performed by the locomotives and engine hands of the respective companies.

And this transportation of trains by authority of said ordinances, done by the consent and authority of the Augusta & Summerville Railroad Company, is the same complained of by the defendants in this bill, in their several actions hereinafter named; and no other running of trains or engines has been done by them, or either of them, than according to said ordinances and contracts, and the permission of said city council of Augusta.

And in addition to the right founded on the foregoing premises, which is common to all the companies, the Charlotte, Columbia, & Augusta Railroad Company say that, by ordinance of the city council of Augusta, adopted April 27, 1869, the Columbia & Augusta Railroad were expressly authorized to cross the Savannah river and connect with the tracks of the Augusta & Summerville Railroad on Washington-street.

The South Carolina Railroad Company and the Charlotte, Columbia, & Augusta Railroad Company also say that, on June 1, 1869, a contract was entered into between them and the city council, and the said trustees of Richmond academy by which, for a valuable consideration, the said city council conveyed to said railroad companies, in perpetuity, severally and

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respectively, the right to use said track on Washington-street, with steam or other power.

And all the said ordinances and contracts between said city council and said Augusta & Summerville Railroad Company, have been confirmed by the act of the legislature, approved October 26, 1870.

Washington-street is sixty-five feet in width, and said railroad track is five feet in width, located in the center of the street, and on the same level as the street, and offers no obstruction to the crossing of the street, at any point, beyond a slight jolting of vehicles; whereas, before said track was laid, there was an open ditch or drain, from time immemorial, down the center of said street, which effectually prevented any crossing thereof save at the crossings of other streets, which drain has been covered by the track aforesaid, at the expense of complainants.

The fee of the soil of said Washington-street is in the state of Georgia, subject only to its use as a public highway by the people of the state; said street was laid out as a street and public highway when Georgia was a British colony, on land belonging to the Proprietary Trustees, and afterwards to the Crown, and the title to the same has never passed out of the sovereign to any private person; and they pray that any private person who asserts a right as of fee in the land covered by said street may be held to the strict proof thereof.

The foregoing premises vest in them the legal right to run their trains by steam power on said track, on Washington-street, without responsibility for damages to any private individual for so doing.

Yet they are now, and are likely to be hereafter, greatly harassed and put to costs and expense by suits for damages by individuals claiming to be injured in depreciation of real estate alleged to be caused by the exercise of their said rights.

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And already actions for damages to real estate on Washington-street, caused by the running of trains as aforesaid, have been commenced against each of them severally—except the Augusta & Summerville Railroad Company—by the said defendants in this bill, being, in all, twenty-eight suits, of which all but the action of Mrs. Mary M. Clanton were brought to January term, 1871, of this court; and the suit of the said Mrs. Clanton was brought to June term, 1871. And all said actions are still pending, and are for damages upon the same grounds. Such actions being merely for damages for a limited period, can not finally settle the controversies between the parties, but they are liable to continual and repeated litigation, which is contrary to the policy of the law. And moreover, in such actions, if damages are held to be recoverable, it would be impossible for a jury to assess what any one company should pay without considering the liability of the other companies, on which each one ought to be heard. And for other reasons, complete justice can not be had under the mode of proceeding of the common law; and, therefore, complainants bring this their bill, in the nature of a bill of peace, to the end that all these matters may be heard and determined at once, and protection be afforded against a multiplicity of suits.

They pray that said defendants may, without oath, answer this bill, and that they be restrained, by the writ of injunction, from further prosecuting their said actions at law, until the further order of the court, and that a decree may be had upon the hearing of this bill, establishing and confirming to each of the complainants the right to use said railroad track for the carrying of freight and passengers by steam power, or other power, and that said defendants be perpetually enjoined from prosecuting said actions, or any future actions on account of their so using said railroad track.

Or, if it should be determined that said defendants

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are entitled to damages, that they be required, respectively, to establish their claim thereto, and that their damages be assessed up to time of decree; and also, that such other sum be assessed to each as will be full compensation in the future for the perpetual use of said track, in manner aforesaid; and that complainants have the option either to pay the damages already accrued, and abandon for the future the use of steam on said street, or to pay the total sum, and thereby acquire against said defendants, their heirs, representatives and assigns a right in perpetuity to use said track with steam power. And that, in either event, the decree be final between the parties, and that, by the same decree, the damages to each defendant, if any are found due, be divided and apportioned between such of complainants as are sued in said actions according to equity.

To the bill was attached copies of said contracts, &c. The chancellor ordered the defendants to show cause why the injunction should not issue according to said prayer. They demurred to the bill upon the grounds that it was multifarious and contained no equity calling for injunction.

The chancellor ordered the injunction to issue against each of said defendants, who did not, in thirty days, file in the clerk's office of said court, a consent to accept the final verdict and judgment of said court as full compensation for all damage sustained by him or her; as to each who would file such consent the injunction was refused.

Both parties filed exceptions, the complainants saying the chancellor erred in not granting the injunction unconditionally, and defendants that he erred in not dismissing the bill, and in granting any injunction.

William T. Gould, W. Hope Hull, Johnson &

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Montgomery, D. Jackson and Frank Miller, for the complainants.

Hook & Gardner, C. Snead, Clark & Spencer, and McLaws & Ganahl, for the defendants.

LOCHRANE, Ch. J.—1. This case comes before the court upon a bill of exceptions, filed by both the parties, to the judgment of the court below. The authorities of the city of Augusta entered into a contract with these various roads, by which they permitted them the use of a certain street, known as Washington-street, in Augusta, to run their cars to carry freight and passengers through that city, along that street. Several of the property owners on the street brought suits at common law for damages against the railroad companies. This bill was filed by the companies in the nature of a bill of peace, to bring all the parties into a court of equity, and prays an injunction against them on the ground that they had no right of action, this permission having been first granted by the municipal authorities of the city, and afterwards ratified by the legislature of the state; alleging that they were in the exercise of their legal rights, and such rights were not the subject-matter of a suit for damages, inasmuch as the act of the legislature ratifying the act of the authorities of the city of Augusta, in giving the railroads the right to this street, contained no provision for the assessment of damages for compensation. The court maintained the bill and refused to dismiss it for want of equity, holding that it was in the nature of a bill of peace, and he could maintain jurisdiction in it.

The railroads excepted to his decision on the ground that he held a right of action accrued to those parties. The others excepted on the ground that he had fettered their legal rights with this illegal condition he had imposed upon them.

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We hold, from the facts disclosed by this record, that equity may take jurisdiction by bill, in the nature of a bill of peace, under section 3166 of the Code, and bring all the parties, plaintiffs and defendants, into the forum, and adjust their several rights by one decretal verdict; and the inquiry upon the trial of such case will not only cover past, but future damages, so as to estop all further or future litigation in or about the same subject-matter, and operate, upon compliance with such verdict, as a complete investiture of the legal rights, free from further claim of damage against the railroads in their use of Washington-street, Augusta, for railroad purposes, within the legitimate scope of the legislative right granted to them.

2. The controlling question made by this record, and upon which all others hinge, is, whether the railroad companies are liable for damages to the holders of property along Washington-street, in the city of Augusta, by the use of the street by them for railroad purposes. This question is one of vital importance in its consequences, and in the adjudication of the principles involved in it. The previous decisions of this court upon questions arising under the use of the street, by these railroad companies, relieves the question of many auxiliary subjects, and leaves it to be decided upon broad principles of law. The fee to the street in question is conceded to be in the state. That the city authorities of Augusta and the legislature have granted this right to the railroad companies is equally admitted. That, by reason of such legislation, such use of the street is not a public nuisance, has been determined by this court. That the action of the legislature makes no provision for compensation or assessment for damages, is a fact unquestioned.

And the case, therefore, presents itself upon a naked legal principle as to whether the use of a public street in an incorporated city can be granted to railroads to

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run their cars over by steam power by the municipal authorities, and, when ratified by the legislature, will such municipal and legislative permission prevent suits for damages against such roads by property holders abutting on said street.

And *is the silence* of such legislative act in regard to compensation a denial of the right to claim damages at common law? The argument concedes that suit may be instituted for damages by the lot owners, if the use of the street by the railroads denies to such owners free ingress to and egress from their property over and upon such streets. But, it is contended with great ability, and upon a large array of authority, that, in the absence of all statutory provisions to that effect, no case, and certainly no principle, seems to justify the subjecting any person, natural or artificial, in the prudent pursuit of his own lawful business, to the payment of consequential damages to other persons in their property or business. *Redfield on Railways*, 291. And, in support of this proposition, cases are relied on decided by this court: 28 *Ga.* 418, and 34 *Ga.* 327. The basis of these recognized principles is, that where *property* of the individual is not taken for the public use, the injury resulting from the legitimate exercise of a lawful employment, working injury, is *damnum absque injuria*.

If the property were taken, the right to compensation can not be denied, for it is constitutionally guaranteed, and the legislature limited in that respect. A very delicate question arises upon construction, as to whether there can be a taking, within the constitutional inhibition, of rights and easements, which are a part of the necessary use to the full enjoyment of the property, without compensation. If the track lay upon an inch of ground belonging to another, it is so sacredly guarded that no power, state or national, could appropriate it. And yet, by the admission of the principle

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contended for, a man may be driven from his home and household gods. Trains, freighted and driven by steam, with gusts of thick smoke through his windows, and screaming along in front of his door, may affect his health and destroy his peaceful enjoyment of his property, and he is remediless. Are not these equivalent, in the construction of law, to a taking? COOLEY, in his *Constitutional Limitations*, a work of great ability, and entitled, from its thorough analyzation of all the subjects upon which it treats, to great consideration, says: "Any injury to the property of an individual, which deprives the owner of the ordinary use of it, is equivalent to a taking, and entitles him to compensation." *C. C. L.* 554; 14 *Comst.* 146. But the idea suggested is, that the legislature must have provided for the compensation, fixed a rule of damages or mode of ascertainment. And, again, while the grant of the right by the legislature prevents the act done from being regarded a nuisance, we are of opinion it is not a logical or legal consequence of such grant, that it may not inflict injury or damage. The admission of the one is not the necessary exclusion of the other. And we, therefore, arrive at the conclusion that, when the state grants a right, the use of which works an injury to another, and the law provides no mode of assessing compensation for such an injury, the right of suit for damages, if any can be proven, as we will hereafter discuss, is not taken away by such law.

3. Now, by contract, purchasers of property on Washington-street acquired, by ownership, a right to the free use of it for all purposes, and it makes no difference where the fee to the highway resided. The use is the subject-matter of disturbance. It will not be doubted that a public street is for the use of the public, and all obstructions thereon are trespasses in law. And in these days of progressive improvements, we admit the legality for public use of such streets, by laying an

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iron bar upon them, to facilitate conveyance, by permitting cars to run over them. The enlightened opinion of the world recognizes this appropriate use; and we indorse the authorities of judges and publicists on this subject. We need not pause to notice the growing tendency of courts to shield corporations from all prejudiced assaults through the forms of law. Monopolies are evidences of civilization, and invoke no captious criticism at my hands.

But, after a careful review of the authorities presented, I am not satisfied that the use of a public street in a city by steam power, is within the legitimate use of such street. I think the streets may be used, and bars laid upon them, and cars drawn over them by *horses*; but there is something in a *locomotive power*, in throwing smoke into the houses along the street, its tremendous weight shaking the houses and breaking plastering and walls; and in the noise and screeching of whistles, which, in the machinery employed, may make it the subject-matter of injury, which the horse-car, slowly driving along, would not occasion. It is not in the use of the street for cars, but in the mode of use. And, as an original proposition, I gravely doubt the right of any power to take a street, dedicated to public use for the citizens, and convert it into a railroad track, without the consent of the property holders thereon, where it comes as an obstacle to a great thoroughfare, and the law provides no compensation. The right of eminent domain may be exercised over houses or streets, but the legislature of Georgia, in the grant of charters, never contemplated arbitrary going through towns upon the part of railroads.

Nor can it be said that the citizen who buys property with knowledge, and by right, can not complain of the use of the street upon which it lies for any public purpose, if, by such knowledge, he is to be held as understanding the power to make a railroad track of

the street is contemplated. Such is not ordinary ; and when it is done by the legislature, I am of opinion he has the right of suit left ; that he is not shorn of his right to complain and present his case to the court and country.

But, on the trial, the most difficult question still remains to be disposed of—as to what elements of damage may be given in evidence.

From the view I entertain on the subject, I am satisfied that the rule ought to embrace the actual damage sustained from obstruction to the free ingress and egress, and access over and upon the streets. Inasmuch as the law has allowed the use of the streets by steam-cars, the passage over the street would not be, in itself, an obstruction, while reasonably exercised. And the laying of the iron upon the street, though it may create a jolt in crossing, would not be an element of damage ; for it lies there by direction of the law. Nor would the apprehension of safety to children going out upon the street, nor the possibility of sickness in families, or any fanciful or speculative disturbance constitute an element. The damage which the law recognizes must be actual, something tangible and determinable ; and to arrive at this the occupation of the parties, by which losses in scholars, or in trade, or the like, have been occasioned, would not be legitimate ; but the actual depreciation of the value of property would be proper, and this depreciation, not only from questions of access upon the street, but the noise, smoke, shaking of walls or plastering, and the like, which can be traced as effect to cause. In cases of this kind damages are not given for feelings of parties, or the fact that carriages might be injured by runaway horses, or that visitors are prevented from coming to the house, but must rest upon some solid, tangible injury ; all consideration of sentimental injuries must

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be kept away in evidence and in argument from the jury.

We, therefore, affirm the judgment of the court below, so far as he held jurisdiction in equity over the parties and subject-matter and enjoined the suit at law, reversing the condition required to be filed in writing, and give direction to the trial, covering all the equities and rights of parties, and settling by one verdict, and apportioning the damages found, if any, among the various roads, and the past and prospective claims of damage to be settled, and the roads have, from compliance with such verdict, future indemnity.

Judgment affirmed, except as to the condition therein stated ; as to that, reversed.

WARNER, J., concurred.

McCAY, J., dissented.

MCINTIRE v. THE WESTERN NORTH CAROLINA RAILROAD COMPANY.

67 *North Carolina*, 278.

Supreme Court of North Carolina ; June Term, 1872.

Compensation for injury to property from construction of railway.

Actions. Where the law provides a special proceeding for the assessment of damages to the land of a private individual, resulting from the construction of a railway, his remedy at common law by action of trespass on the case to recover damages for the injury is taken away.

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Appeal to the supreme court of North Carolina from the superior court of McDowell county.

This was an action to recover damages for injuries caused by the construction of the defendant's railway upon the plaintiffs' land. The court held, upon the grounds stated in the following opinion, that such an action could not be maintained. From this decision the plaintiffs appealed.

Ovide Dupre, for the plaintiffs.

W. H. Bailey, for the defendant.

RODMAN, J.—The only question presented in this case is, whether the common law remedy of an owner of land, by an action of trespass, against a railroad company which has entered on his lands for the purpose of building its road, is taken away by *Rev. Code*, ch. 61, §§ 9 to 21; or whether the remedy thereby given is cumulative.

We are of opinion that the intention of the act was, to deprive the owner of his common law remedy, and to give him the one provided by the act in lieu of it. We come to this conclusion from the analogy between the policy of the act mentioned, and the act of 1809 on the subject of mills: *Rev. Code*, ch. 74. We admit that the language of the latter act more clearly excludes a resort to the common law remedy, than that of the one in question. But the decisions, *Gillet v. Jones*, 1 *Dev. & B.* 339; *Gilliam v. Canady*, 11 *Ired.* 106, do not go so much on the words of the act as upon its evident policy. If the owner of land overflowed by a mill dam could bring his action on the case for damages every day, no public mill could be established. In like manner, if the owner of land taken by a railroad for its track could bring his action of trespass every day, no

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railroad could be built. In such case the law considers the property, though taken for an individual, or for a private corporation, as taken for the public use. *Raleigh, &c., R. R. Co. v. Davis*, 2 Dev. & B. 451. It is not forbidden by the constitution, if compensation be made; and compensation is provided for. The mode of obtaining it may not be so easy or satisfactory to the owner, but it is not illusory; a substantial and just compensation may be obtained. There can be no doubt that the legislature had the right to take away the common law remedy; the only question possible is as to their intention.

It is suggested, however, that the act only intended to furnish the company with a means of acquiring a title to the land needed, and not to deprive the owner of any remedy unless the company availed itself of the means furnished. But the act says *either* party may proceed, by petition, to have the damages assessed. If the officers of the company can not enter on lands and make surveys without a trespass, they could never locate the road. And if the road were located, and its construction delayed until the damages to all the land owners on the route were ascertained under the act, the delay would be indefinite, and of no benefit to any one. To hold, that during the pendency of a proceeding by the company to have the lands condemned, it could not prosecute its work without being exposed daily to an action of trespass, would effectually defeat the policy of the act. The act intended to allow the company to enter and construct its road at once, leaving the question of damages (if the parties could not agree on them) to be settled afterwards. The company was not obliged to initiate proceedings. It is not obliged to know that the owner claims damages, until he claims them in the mode provided.

There is a view of the act which seems conclusive. What could be the sense or policy of giving to the land

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owner the comparatively feeble remedy provided by the act, unless it was intended, or supposed, that he would thereby lose the one already possessed, so much more potent, and adequate for every occasion.

BY THE COURT.—Judgment affirmed.

THE STOCKTON & VISALIA RAILROAD COMPANY v. THE COMMON COUNCIL OF THE CITY OF STOCKTON.

41 *California*, 147.

Supreme Court of California; April Term, 1871.

Statutes. The power of the judiciary to declare an enactment of the legislature of a state unconstitutional should never be exerted except when the conflict between the statute and the constitution is palpable and incapable of reconciliation. An alleged limitation upon the powers of a state legislature must appear either by the words employed for that purpose in the constitution, or by an implication necessarily flowing from those words, and without which the words themselves can not have their natural force and fair import.

Taxes. The constitution of California places no limitation upon the power of the legislature to impose taxes. The principle upon which taxation is to be imposed is pointed out, but the extent to which it may be carried is left unlimited, except by legislative discretion.

Eminent domain. Taxes. Where the "public use" for which a state constitution allows private property to be taken is not defined by the constitution, its definition must be left, in large measure, to legislative determination; and the resolve of a legislative body by which a tax is imposed, or private property taken is, necessarily, such a determination. Hence, when the legislature has determined that a particular railroad in fact concerns the public interest, its determination in that respect can not be reviewed by the courts.

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There is no difference between the public use which will authorize the taking of private property in aid of a railroad, and the public use which will support the laying of a tax in aid of the road. Wherever the power of eminent domain may be exercised in aid of a railroad, taxation may be resorted to for the same purpose.

Aid to construction of a railroad, as a public use, may be extended by means of the power of eminent domain, or by subscription to capital stock, or donations made by cities and other political subdivisions of the state, under authority of the legislature.

The fact that a railroad is owned and operated by a private corporation, and for private profit, does not prevent its being also of public use.

Application to the supreme court of California for a writ of mandate.

The petition prayed for a mandate requiring the city of Stockton to levy a tax sufficient to pay the interest due on bonds of the city issued to aid in the construction of the petitioner's road, under an act of the state legislature, *Cal. Stat.* 1869-70, 551. The respondents' answer alleged that the statute authorizing the issue of the bonds was unconstitutional and void.

J. R. McConnell, J. B. Hall, and S. W. Sanderson, for the petitioner.

Jo. Hamilton, Attorney-General, and Hale & Edmonds, for the respondents.

WALLACE, J.—An act was passed by the legislature at its late session, and approved on April 1, 1870, which is entitled "An act to empower the city of Stockton to aid in the construction of the Stockton & Visalia Railroad." *Acts* 1869-70, 551.

In substance it directs the municipal authorities of the city of Stockton to donate three hundred thousand dollars to a company who propose to build a certain

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railroad, having a permanent terminus in the city itself, at its water front. Under the provisions of the act, the bonds of the city for the entire sum are to be placed in the hands of three gentlemen named in the act, who are thereby created a disbursing board, and who are to deliver the bonds to the company in designated sums, from time to time, as the work shall progress. These bonds are to bear annual interest, accruing at a fixed rate; and to pay this interest, as well as to discharge the principal sum mentioned in the bonds, the act directs the municipal authorities of the city to levy an annual tax, in the same manner in which city taxes for general municipal purposes are collected, &c. The authorities of the city have pursued the directions given them by the legislature, so far as to prepare and deliver the bonds to the disbursing board; but they now refuse to levy the tax to pay the accruing interest thereon.

To compel them to do this the present application for a mandamus is made by the railroad company.

The application is resisted by the city upon a single ground—"that said act of April 1, 1870, and all the provisions thereof, are, and ever have been, repugnant to and in violation of the constitution of the state of California."

It is thus made apparent that the case here must turn wholly upon the question of constitutional power in the legislature to enact the statute, and that our duty begins and ends with a consideration of the mere point of law presented.

This is so obvious that no one will controvert it. It is so plain of itself that no reasoning nor process of demonstration could make it clearer. But, self-evident as it is, a perusal of the voluminous printed arguments on file admonishes us that it is not so plain but that it may easily be forgotten. Surely we are not here to pass upon the motives of the authors of the statute.

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Though "corruption may invade the halls of legislation, and the interests of the people be betrayed by their chosen representatives," and though "the executive may prove faithless to his trust," the constitutional authority of these functionaries to enact this statute would, nevertheless, be precisely as broad and deep in its measure as though the act in question were admitted to have found its inspiration in the widest statesmanship and the purest public virtue.

It is unavailing, therefore, that the counsel for respondents should come here to complain that "it is notorious that the facility of influencing legislative bodies is such that the passage of any measure can be secured through the usual appliances; for even if, unfortunately, this be true, it is also true that we have no authority to reform these "legislative bodies," nor to call them to account for the manner in which they may have conducted the public business intrusted to their hands. Questions, too, which regard the mere policy of the statute—inquiries as to whether it is in itself a wise law or a foolish law; whether its anticipated operation will be to promote or to retard the true prosperity of the people—are not for us to consider; for these, and other questions cognate to these, involve the field of mere political inquiry, which it does not become us to enter, and which we can not enter, except we overleap the barriers by which the limits of our rightful authority are plainly defined.

We have deemed it proper to say thus much *in limine*, in order that our purposed silence in regard to these matters, concerning which it is our duty to be silent here, may not be misconstrued or misunderstood.

The case before us requires an examination at our hands into the authority of the legislature to enact the statute in question.

The authority of the judiciary in this country to consider of the extent of the legislative power in the

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enactment of laws was formerly denied *in toto*, and it will be remembered that in the early days of the federal constitution some of the most distinguished public men, among whom was Mr. Jefferson, maintained the opinion that no court had the rightful authority to declare a statute unconstitutional which had received the sanction of the popular will, acting through its chosen representatives. It is known, too, that an impeachment of a judge of a state court of the highest grade was, at a later period, instituted for an attempt upon his part to uphold this power, admitted to be anomalous, and that upon his trial but a single vote was wanting to his conviction of the charge of usurpation of authority in his office.

Though the power itself is now admitted, it is, nevertheless, conceded to be always one of the utmost delicacy in its exercise, and never to be exerted except when the conflict between the statute and the constitution is palpable and incapable of reconciliation. To this effect the authorities are substantially uniform.

In *Santo v. Iowa*, 2 *Iowa*, 208, Mr. Justice WOODWARD, in delivering the opinion of the supreme court of Iowa, unanimous on this point, said :

“For some time after the establishment of the state government, it was doubted whether the judiciary possessed authority to declare and hold an act of the legislature unconstitutional and void, and the exercise of the power was declined by some courts. And now, although the power is universally admitted, its exercise is considered of the most delicate and responsible nature, and is not resorted to unless the case be clear, decisive, and unavoidable.”

And said the supreme court of Indiana, 4 *Ind.* 344 :
“Such questions (involving the constitutionality of statutes) are always regarded by the courts as of serious importance. The judiciary look to the acts of the legislature with great respect, and reconcile and

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sustain them if possible. The general assembly is the immediate exponent of the popular will—expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the constitution is not to be lightly indulged. That the act is imperfect or impolitic is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the courts, it must be clearly subversive of the constitution.”

See, also, *Rice v. Foster*, 4 *Harr. (Del.)* 479; *Fisher v. McGier*, 1 *Gray (Mass.)*, 1; *Commonwealth v. William*, 11 *Pa.* 61, where the supreme court of Pennsylvania say: “Of late years it has been much the fashion to impeach the action of the legislative bodies as unconstitutional, when it happened not to accord with the party’s notion of propriety and abstract right. This is very frequently done in sheer oblivion of the doctrine that express prohibition or necessary implication is essential to oust the state legislature of authority.”

We think that the adjudications in this court give the correct definition of the judicial power to declare a statute unconstitutional, as now maintained by the general current of authority. It is said, 12 *Cal.* 384, that it “should never be exercised unless there be a clear repugnancy between the inferior and the organic law.”

Again, 17 *Cal.* 30: “But the legislative department, representing the mass of political powers, is no further controlled, as to its powers, or the mode of their exercise, than by the restrictions of the constitution. Such restriction must be shown, before the action of the legislature, as to fact or mode, can be held invalid.”

Again, 17 *Cal.* 551: “But it is equally well settled that this power (to declare an act of the legislature unconstitutional) is not to be exercised in doubtful cases,

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but that a just deference for the legislative department enjoins upon the courts the duty to respect its will, unless the act declaring it be clearly inconsistent with the fundamental law, which all members of the several departments of the government are sworn to obey."

The law-making power is, in its essence and nature, the supreme power in the state, and the legislature, in its exercise, impersonates the aggregated sovereignty of the people themselves.

Hence it results that the legislature is politically omnipotent, except in those particulars in which its power has been limited, qualified, or absolutely withdrawn by the provisions of the federal or the state constitution. Said Chief Justice BLACK, in speaking of this feature of our organized political system: "If the people of Pennsylvania had given all the authority which they themselves possessed to a single person, they would have created a despotism as absolute in its control over life, liberty, and property as that of the Russian autocrat. But they gave a portion of it to the United States, specifying what they gave, and withholding the rest. The power not given to the government of the union was bestowed on the government of the state, with certain limitations and exceptions expressly set down in the state constitution. The federal constitution confers powers expressly enumerated; that of the state contains a general grant of all powers not excepted. The construction of the former instrument is strict against those who claim under it; the interpretation of the latter is strict against those who stand upon the exceptions, and liberal in favor of the government itself. The federal government can do nothing but what is authorized expressly or by clear implication; the state may do whatever is not prohibited." *Sharpless v. Philadelphia*, 21 *Pa. St.* 160.

These general views found early expression in this court, *People v. Coleman*, 4 *Cal.* 46; *Thorne v. San*

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Francisco, *Id.* 157, and have since been steadily maintained here. 6 *Cal.* 89; 13 *Id.* 159; 17 *Id.* 547; 26 *Id.* 183.

Whenever, therefore, it is alleged that a statute which has been enacted in due form by the legislative department of the government of this state is, indeed, in excess of its authority to enact, it is necessarily the allegation of an exception to the contrary of an admitted general rule; and, therefore, the construction is "strict against those who stand upon the exception, and liberal in favor of the government itself."

Hence, when we are called upon to declare that there was no authority for the legislature to enact a particular statute, it is necessary that we be pointed to the clause or clauses of one or the other, or both, of these constitutions, supposed to have taken away the power entirely, or limited it to something else than the subject to which the legislature has applied it. It will not do to talk about the "spirit of the constitution" as imposing a limitation upon the legislative power. The limitation ought to be something definite in itself—as definite as a sum to be subtracted from a larger one, in order to ascertain a balance.

The "spirit of the constitution" as an interdiction upon legislative power was repudiated by this court, in *Patterson v. Yuba County*, 13 *Cal.* 182, in which Mr. Justice DANIEL, of the supreme court of the United States, is mentioned as having said that "if judges were to adopt the notion that a law might be declared unconstitutional because of its supposed repugnance to the spirit of the constitution, they ought to employ a rapping medium to procure authentic revelations from that spirit." The "spirit of the constitution," as a means to ascertain the powers of other departments, would partake too much of the personal spirit of the individual judges chosen for the time being to interpret that instrument, and chameleonlike it would be apt to

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prove white, or gray, or red, or bluish, or bottle-green, as the peculiar views of those having the spirit in their keeping might give it color. However it may be urged upon a court as a standard by which legislative power is to be measured in a particular case, such as that now at bar, for instance, we think that even those who so urge it would hesitate long before they could be brought to inscribe it upon the constitution itself, that the powers of each of the departments of the government should actually be limited by the "spirit of the constitution," as from time to time declared by the courts.

The rule which requires that an alleged limitation upon the powers of the state government should appear either by the words which the people have employed for that purpose, or by an implication necessarily flowing from those words, and without which the words themselves can not have their natural force and fair import, is firmly established.

It assumes, and correctly assumes, that it was the intention of the people that their representatives should exercise all political power, except such as the people themselves have singled out, and have either forbidden to be exercised at all, or permitted to be exercised only upon certain conditions, and under stated circumstances.

If, however, there be among the great powers of government a single one upon which, more than upon any other, we would anticipate that the intended limitation of the power would have found exact and careful expression upon the face of the constitution itself, that one would be the power involved in the case at bar—the power of taxation; for it is notorious that in this country and elsewhere (everywhere that government has found an organized existence among men), it has, more than any other, perhaps more than all other powers together, proven to be the exhaustless source of political disquiet and disturbance in the body

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politic. Its general history has been much the same in all countries where the people have aspired to be free, and have sought to obtain guaranties for the safety and the protection of their property against the unreasonable or irregular exactions of government.

To go back somewhat less than three hundred years in the history of the country from whose political polity many of the most important features of our own system have been derived, we find an important tax controversy pending upon the point of the power to impose taxes upon the people, and the particular inquiry was, whether that power belonged to the King, by virtue of the royal prerogative, or was only to be exercised by the people themselves, through their representatives in parliament.

It was in 1606 that Bates's case arose, upon an information in the Exchequer, in which the question was distinctly presented. It was recognized as one of surpassing importance to the English people, and, in his argument against the asserted power of the Crown in that case, Mr. YELVERTON gave expression to the popular view of the day when he said: "It is not what we shall be called, or how we shall divide what we have, but whether we shall have anything or nothing."

Bates's case was determined by the court in favor of the Crown, as were other like cases which followed—among them the celebrated case of Hampden concerning the ship money. The controversy thus waged in the courts led at last to the long and disastrous struggle which culminated in the overthrow of the government and the establishment of the protectorate. That all taxes must be laid by the people, through their representatives in parliament, has been since firmly maintained in England. At the Restoration, even, amid the general national joy at the welcome event, it was not forgotten to resolve, that to tax in any other manner than "in parliament is against the law

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of the land." The House of Commons alone has authority to originate bills of supply, and the upper branch of parliament has no power to even amend such a bill, for the House of Commons only is composed of the representatives of the people.

In this country the revolution, as is well known, originated in the same idea, so firmly fixed on the popular mind, that taxation should be imposed on the people only through their chosen representatives. Hence, in organizing the federal government, the house of representatives was given the sole power of originating bills for taxation, *Const. U. S.*, Art. I., § 7; and various constitutional provisions upon this particular subject are to be found in the state constitutions of some thirty-three of the states, in some of which the rule, that measures of taxation must originate only in the popular branch of the legislature, is preserved, and in the others qualified or abrogated altogether.

It would be somewhat strange, in view of this history, if it should, after all, appear that those who framed the constitutions of the state governments in this country, and especially that of the state of California, should have, through mere inattention, failed to limit the power of taxation in every respect which was deemed practicable. We accordingly find in the constitution of California, in section 13, article II., an important limitation, not, indeed, upon the extent of the power itself, but upon the mere mode upon which it is to be exerted. Taxation is thereby required to operate equally and uniformly, and upon the *ad valorem* principle. No attempt was made to limit the *power* itself in the hands of the state government. The convention at Monterey knew very well that such an attempt would be an attempt upon the safety of the government which it was their purpose to establish—not imperil.

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Taxation originates in the financial necessities of government. Those necessities are in themselves illimitable by human agency. The means of the supply, to be adequate, must be illimitable too. It can not be foreseen by the framers of the constitution, who would limit the power of taxation, what may be the necessities of the government, at a given time, or under the pressure of attack from without, or insubordination within its borders, or what pecuniary means it may need in its possible struggle with those difficulties which it is the very purpose of organized government to meet and overcome. To assure the public safety, therefore, dictates that the state be clothed with power to command its entire material resources.

HAMILTON, in elaboration of this truth, says: "Money is with propriety considered as the vital principle of the body politic—as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and in a short course of time perish." *Federalist*, No. XXIX.

The possible financial necessity of the government may require all the wealth within its limits. The extent of the actual necessity is for the legislature to determine in all cases; this is political power. It is the power to exhaust the substance of the people by a levy equal in amount to their aggregate wealth. Hence it was aptly said by Chief Justice MARSHALL, more than fifty years ago, in speaking of the power of taxation, as it existed under the American constitutions in his day, that

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“the power to tax involves the power to destroy.”
McCulloch v. Maryland, 4 *Wheat.* 316.

In the same case, the same great authority adds, p. 428: “The only security against the abuse of the power is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government can not be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislators, and on the influence of the constituents over their representatives to guard them against its abuse.”

The convention at Monterey understood well that they had not limited the power of taxation in the state government, and they understood, too, the reason why they could not venture upon the experiment. This is seen by section 37, article IV., where they provide for restricting the power of municipal corporations to impose taxes. This restriction of the power of taxation in the hands of municipal corporations could be safely imposed, because the safety of the state was not supposed to be committed to the municipalities, in general charged with duties of a mere local and police character. That the convention would have imposed a similar or some limitation upon the taxing power of the state, had it been considered advisable at that day, can not be doubted, for they limited the public indebtedness to a fixed sum, except under peculiar and named circumstances, article VIII.; and they utterly prohibited the loaning of the public credit for private purposes under any circumstances whatever, section 10, article XI.; but they omitted, and evidently *ex industria*, to place any limitation upon the mere power of the state to impose taxes. The principle

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upon which taxation is to be imposed by the state government is pointed out by the constitution, but the extent to which it may be carried is left unlimited, except by legislative discretion. It is to be exerted to raise money for public use.

The "public use," though mentioned in the constitution, is not mentioned with reference to the power of taxation, or in connection with any limitation upon that power contained in that instrument.

It is declared, section 8, article X., that private property shall not be taken for "public use" without just compensation. No constitutional definition of the words "public use" is, however, given in that instrument.

For much the same reason as that already mentioned, concerning limitation upon the power of taxation in the hands of the state government, the "public use," upon which the power of eminent domain was to be exerted, seems to have been left, in large measure, to the determination of those who were clothed with its exercise, in view of possible contingencies with which they might be called to deal, rather than to attempt its restriction by anticipation.

"Public use," "public purpose," and "public policy" are much the same in import. "Public policy,"—the policy upon which governmental affairs are conducted for the time being—is legislative policy in the main, and "public use," and "public purpose," are largely dependent upon this policy—notoriously varying in our country, from time to time, with the accession to power of political parties, differing from each other as to the system of measures best adapted to promote the interest of the state. The resolve of a legislative body, by which a tax is imposed, or private property taken, is, therefore, necessarily a legislative determination, that a public use is to be promoted by the tax, or the taking directed; and such a determina-

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tion is the determination of a merely political question by the political department of the government.

The legislature, in the case before us, having determined the construction of the contemplated road from Stockton to Visalia to be a matter of public concern, and as such authorized taxation to aid in the work, the question arises as to how far that determination is open to review in the courts. That question was answered by this court in the case of *Napa Valley R. R. Co. v. Napa County*, 30 *Cal.* 437: "Railroads concern the public interest as matter of legal judgment, and however that conclusion may be opposed to the fact in the case at bar makes no difference, the action of the legislature on the question not being open to review by the judicial department of the government."

If we could review the legislative determination upon that point at all, a question would necessarily arise as to the extent to which that review could be carried here. Could we substitute our judgment upon the point for that of the legislative department absolutely, as we sometimes substitute our judgment for that of a court from whose judgment an appeal has been prosecuted to this court? If it was the intention that we should do so, it would seem that the law should have pointed out some mode by which we could get before us, in an authentic form, the facts and circumstances upon which the legislative department proceeded in the particular case. In the absence of a knowledge of these facts and circumstances we would ordinarily be unable to say that an error had been committed at all. A case might, indeed, be presented in which it might appear, beyond the possibility of a question, that a tax had been imposed, or the property of a citizen had been taken for a use or purpose in no sense public; or, in the language of Chancellor WALWORTH, 5 *Paige* (*N. Y.*), 159, "where there was no foundation for a pretense that the public was to be benefited

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thereby," and in such case it would be our duty to interfere and afford relief. But should we interfere in any other than such a case, we would but substitute a policy of our own for the legislative policy in the conduct of the affairs of the state, and substitute our will for that of the representatives of the people. The legislative judgment may have discovered a public use and a public benefit in the encouragement of a particular class of improvements in the state; it may be a public use in the building of a bridge, a road, or a mill; and may, in that view, aid its construction by giving the public funds towards that end. We may be ourselves unable to see why the particular work thus selected for government aid should be preferred to another work of equal, or, perhaps, in our judgment, of even greater public importance, but which has, nevertheless, been wholly overlooked; but we can not, upon such a view, forbid the government aid to the work selected, any more than we could direct a similar bounty to the other work, in our opinion unreasonably omitted. In Tennessee, for instance, a statute declared, at an early day, when grist mills were probably scarce, that every grist mill which should thereafter be built, and should at any time grind for toll, should be held and deemed, "and is hereby declared, to be a public mill." It is further provided that the miller should grind according to turn; that he should grind the grain well, if water would permit; that he should take no more than one-eighth of the grain for grinding; that he should keep a certain description of grain measures; and then follows a penalty for keeping false measures or violating the other provisions of the statute. Under this statute one Goodlett applied, in 1832, to condemn the lands of one Harding, for the purpose of erecting a grist mill, saw mill, and paper mill thereon. The supreme court of Tennessee, upon this application, said: "The grist

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mill is a public mill. The miller is a public servant. He is allowed a compensation for grinding, &c. . . . It will appear, from what has been said, that when an acre of land is taken from any citizen for the purpose of erecting a grist mill, though the title be vested in another citizen, yet that vestiture is for a public use, and is wholly different from the case of taking property from one man and giving it to another for his private benefit only. . . . The petitioners say they are desirous to build a grist mill, saw mill, and paper mill. For these purposes they ask to have Harding's land vested in them. The saw mill and paper mill will have no public character; the erection of these mills would be wholly for the private use of these petitioners. To take Harding's land for such use would be unconstitutional." *Harding v. Goodlett*, 3 *Yerg.* (*Tenn.*) 53.

The legislature of Tennessee, in pursuance of a policy of its own, had seen fit to declare that a grist mill, grinding for toll, was a mill for public use—therefore the court held it to be such. But the legislature had not declared that a saw mill or a paper mill, however conducted, should be considered a public mill—therefore the court could not hold them to be other than private in character. This case arose and was decided nearly forty years ago. The court did not, at that day, undertake to announce a policy of its own, and set it up against the policy of the legislative branch of the government. It did not argue, either, that the circumstance that the miller operated the mill for his "private profit," and received one-eighth of the grist for grinding, necessarily made the mill private, and not public, in point of constitutional law; nor did it stop to inquire whether, if a grist mill operated in that way was indeed to be considered a public mill, it ought not to follow that a paper mill or a saw mill, working on the same terms, would also be public. The court seems to have been of opinion that legislative

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policy has something to do with determining "public use" and "public purpose," and that it was just possible that Tennessee legislative policy might determine that the erection of grist mills in that state would promote a public purpose there, which would not be promoted by the erection of saw mills or paper mills. The court seems to have been of opinion that this was a matter for legislative determination, and it accordingly upheld the authority of the legislature to declare grist mills, though grinding for the "private profit" of the miller, to be public mills; it has not been suggested, either, that at that time the grist mill interest controlled the legislature of the state of Tennessee, or the decisions of her courts. The true rule to be extracted from the cases, and which is applicable to the case at bar, is that if it is possible that the work or object selected by the legislature for aid concerns the public use we must consider that it does in fact do so. If it is possible, therefore, that the city of Stockton may have a public interest in this railroad, then the legislative action is conclusive here that the city does, in fact, have such a public interest therein.

In the Sharpless case, *supra*, Chief Justice BLACK (speaking of the acts under which Philadelphia aided in the construction of certain railroads), expressed this view when he said: "But it is not our business to determine what amount of interest Philadelphia has in either of these improvements. That has been settled by her own officers and by the legislature. For us it is enough to know that the city may have a public interest in them, and that there is not a palpable and clear absence of all possible interest perceptible by every mind at the first blush. All beyond that is a question of expediency—not of law—much less of constitutional law." In Connecticut the rule by which the court interprets the legislative action in such a case was declared in *Booth v. Town of Woodbury*, 32 Conn.

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128. The town of Woodbury was supposed to be bound to furnish thirty-two men to serve in the federal army, under the call of the President during the late civil war. The selectmen of the town, under instructions of a town meeting, proceeded to raise, on account of the town, some six thousand dollars, to be applied towards hiring substitutes for such citizens of the town as might be drafted thereafter, and the legislature of the state subsequently ratified these proceedings by which this gratuity was given by the town. The court say: "In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such action of the legislative power must be of an extraordinary character to justify the interference of the judiciary, and this is not that case. Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, . . . and the determination of the legislature is conclusive. And such is this case. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementoes for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned."

Upon a similar question before it, the supreme court of Wisconsin expresses substantially the same views. It said: "To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which funds are raised must be clear and palpable—so clear and palpable as to be perceptible by every mind at first blush." *Broadhead v. Milwaukee*, 19 *Wis.* 652.

In *Schenley v. Alleghany*, 25 *Pa.* 130, the supreme

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court of Pennsylvania say "that the exercise of the taxing power by the legislature must become wanton and unjust—be so grossly perverted as to lose the character of a legislative function—before the judiciary will feel themselves entitled to interpose on constitutional grounds. To arrest the legislation of a free people, especially in reference to burdens self-imposed for the common good, is to restrain the popular sovereignty, and should have clear warrant in the letter of the fundamental law."

In his work on constitutional limitations, p. 488, Judge COOLEY (perhaps the ablest living commentator upon constitutional law) says: "It must always be conceded that the proper authority to determine what should and what should not properly constitute a public burden is the legislative department of the state, . . . and in determining this question the legislature can not be held to any narrow or technical rule. Certain expenditures are not only absolutely necessary to the continued existence of the government, but as a matter of policy it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. The officers of the government must be paid; the laws printed; roads constructed, and public buildings erected; but with a view to the general welfare of society, it may also be important that the children of the state should be educated, the poor kept from starvation, losses in the public service indemnified, and incentives held out to faithful and fearless discharge of duty in the future by the payment of pensions to those who have been faithful public servants in the past. There will, therefore, be necessary expenditures, and expenditures which rest upon considerations of policy alone, and in regard to the one as much as to the other the decision of that department to which alone questions of state policy are addressed must be accepted as con-

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clusive.” Again, at page 487, the same author, after stating that taxation can be imposed for public purposes only, says: “In this, however, we do not use the word *public* in any narrow and restricted sense, nor do we mean to be understood that when the legislature shall overstep the legitimate bounds of their authority the courts can interfere to arrest their action. There are many cases of unconstitutional action, by the representatives of the people, which can be reached only through the ballot-box, and there are other cases where the line of distinction between that which is allowable and that which is not, is so faint and shadowy that the decision of the legislature must be accepted as final, even though the judicial opinion might be different.”

Other, and like authorities, might be cited upon this point, but we think that without further reference to them it is plain enough that when the legislature has determined a given purpose to be a public purpose, we must so consider it, unless we can see at first blush that it is not possible that it could be such. The field of legislative policy is vast in extent. It embraces in its ample range whatever can be supposed to promote the interest of the body politic, enhance the public revenue by increasing the values of objects to be taxed, facilitate the free interchange of commodities, or improve the social, moral, or physical condition of the community. These, and almost innumerable other and like purposes, favorably affecting, it may be, some particular individuals more directly than others, and benefiting particular interests or localities to a greater degree than other particular interests or localities, are supposed in the general judgment of mankind to be in some degree promotive of the material welfare of the state, and therefore fall within the constitutional power of the legislature, as being purposes of a public character, to be fostered and advanced in its discretion. Within this broad range it is for the legislature to

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select such objects as in its judgment may appear as deserving the munificence of the government, and in so doing "the legislature, as we have seen, can not be held to any technical or narrow rule." It will not probably surprise any one to be told that the discretion to determine what is and what is not in this sense a public purpose is confided to the legislature, and that in the exercise of this discretion that body may, and, indeed, habitually does, clearly overstep the mere actual necessities of the public administration. The popular understanding of the legislative power in this respect, derived from the known habits of the government, must be found to be in accord with the learning of the books which treat of it. In California, for instance, did any one seriously question the authority of the legislature to appropriate the public moneys to meet the personal wants of the overland emigration of 1852? Yet, in the absence of the legislative discretion involved, who could maintain that in point of mere constitutional law the overland emigrants had any right to be fed and clothed out of the public treasury more than other people.

Again: who has come to deny the validity of the legislative appropriation by which thousands of dollars have been and are being annually paid to General Sutter for "private profit," as the respondent's counsel would express it? It is no answer to say that the appropriation of 1852 was prompted by a commendable sentiment of humanity, and that the pension to General Sutter is but the expression of the public gratitude towards a distinguished citizen whose personal kindness and generous conduct have justly won for him the popular esteem. These motives, however worthy in themselves, can not be made to supply the requisite constitutional authority to give away the public moneys.

If the three hundred thousand dollars claimed by

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this railroad company be regarded as a mere gift of that much of the public moneys, it must, nevertheless, be upheld by the same construction of legislative power which would support the pension to Sutter. There is no provision of the constitution which will authorize the gift to Sutter and deny it to the railroad company. The power to select the object of legislative bounty belongs to the legislature itself, as well as the power to fix the amount to be given away. It will be difficult to draw the line of constitutional distinction between the legislative gratuity to Sutter for reasons of a public nature looking to the past, and the like gratuity to the railroad company for reasons of a public nature looking to the future.

We have mentioned the pension to Sutter, and the aid to the overland emigration of 1852, because they are prominent, but at the same time not exceptional instances of the exercise of legislative authority in the general history of the state government under its present constitution. Many other and similar instances may be mentioned. Premiums payable out of the public moneys have been habitually offered for the encouragement of mere private industry. The production of sugar from sorghum, the manufacture of molasses, the production of flax, hemp, cotton, tobacco, hops, raw silk, and the manufacture and production of various other articles by private parties and for "private profit," were stimulated by the offer of large sums from the public treasury, by the "Act for the encouragement of agriculture and manufactures in California." *Acts* 1862, 415. This policy is further maintained by the act of April, 1866, 660, "for the encouragement of silk culture in California," by which premiums are offered by the state for the growing of mulberry trees and production of silk cocoons, and the constitutionality of the act was not even questioned here, in *Attorney-General v. State Board of Judges*,

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38 *Cal.* 291, but the statute was substantially re-enacted in 1868, p. 699; and an examination of the legislative acts will disclose other like instances of the habitual expenditure of the public moneys, the validity of which no one has undertaken to call in question. In view of this public history, it can not surely be claimed in any quarter that legislative authority to expend public moneys in the state was ever understood to be confined to merely keeping the government in motion.

It has, indeed, habitually and notoriously overstepped that limit to find uses of a public character to be fostered by the expenditure of public moneys, and having done so, it is the legislative judgment which must determine whether or not the public interests are concerned in promoting any particular aim or object to a sufficient degree to justify the expenditure. This makes up legislative policy, for it is legislative policy which selects the objects to be aided, and determines the extent to which that aid should be carried.

In the case at bar, it determined the Stockton & Visalia Railroad to be a road for public use, and that, as such, the city of Stockton might donate three hundred thousand dollars towards its construction.

As we have already said, under the rule laid down by this court, in *Napa Valley R. R. Co. v. Napa County*, 30 *Cal.* 437, this legislative determination is conclusive upon this court. It was there held that "railroads concern the public interest as matter of legal judgment," and that when the legislature had determined that a particular road in fact concerns the public interest, its determination in that respect is not open to be reviewed by this court.

Upon that authority we are precluded from any examination into the principal question which the respondent has argued here.

But even if the rule were otherwise the result would be the same. Should we undertake to review the

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legislative determination that this road concerns the public interest we could not disturb it, unless we are prepared to say that there is absolutely no possibility that the proposed road from Stockton to Visalia could in any degree promote the public welfare, and that there is an utter absence of all possible public interest in the enterprise, and that all this is so palpable as to be perceptible to every mind at the first blush.

We are to say this of a highway traversing a considerable portion of the state, and connecting two important commercial points. It is conceded by the respondent that the road in itself is one which the state might have lawfully constructed at the public expense. It is said in *Blodgett v. Mohawk, &c. R. R. Co.*, 18 *Wend.* 1, "That the government have not only the power, but that it is emphatically their duty and interest to construct railroads where the public interest and convenience demand them, can not admit of a doubt; for such purposes they are authorized to take private property upon rendering just compensation; and they are, in like manner, justified in exacting tolls from those who travel on them as a means to reimburse the state for their construction and reparation. . . . If, however, the state shall not deem it wise or expedient at its own expense to construct a railroad, can there be any doubt of its power to impart this authority to others?" The case involved the exercise of the power of eminent domain in behalf of a railroad company—the power of eminent domain, which is only to be exerted in aid of a "public use;" but, in our opinion, it is not the less an authority that taxation might have been imposed for the same purpose. There can be no difference between a "public use" which will authorize the taking of private property in aid of a particular road, and a "public use" which will support the laying of a tax in aid of the same road. We do not say that the power of taxation and that of

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eminent domain are the same in all respects; they both, however, proceed *in invitum*; both proceed, too, upon compensation, real or supposed. That of taxation upon the idea that the government protection to the citizen is his compensation; that of eminent domain upon the money compensation provided by the constitution.

In either case, however, the power must rest for support upon the public use to be promoted; and a quasi public use will not be sufficient in the one case more than in the other. Such a use as a quasi public use is unknown to the constitution, and is only an invention of those who, being driven to admit that the power of eminent domain may be exercised in aid of this road, are desirous, at the same time, to deny that taxation may be resorted to for the same purpose. The question as to whether taxation may be imposed in aid of such a road as this, has arisen and been directly decided under a constitution not differing from ours in any point involved in the decision. Nearly twenty years ago the supreme court of Alabama had under consideration the validity of a statute to authorize the city of Mobile to donate three hundred thousand dollars to the Mobile & Ohio Railroad Company, who were building a road to run from the city toward the mouth of the Ohio river. The company building the road was, in the language of the counsel resisting the Alabama statute, "a private corporation composed of private individuals, who, to promote private fortunes, and to reap the advantage of private enterprise, had associated themselves together," &c. The supreme court, however, decided that the donation might be constitutionally made through the exercise of the taxing power. It said that the power of taxation "extends to the employment of all those measures and appliances ordinarily adopted, or which may be calculated to develop the resources of the state and add to the

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aggregate wealth and prosperity of the citizens ; such, for example, as sundry outlets for commerce, opening of channels of intercommunication between different parts of the state," &c. *Stein v. Mobile*, 24 *Ala.* 614.

That court accordingly upheld the validity of a tax imposed upon the real estate in the city of Mobile for the purpose of raising three hundred thousand dollars, and donating it to a railroad company who were constructing a railroad to run from the city in the direction of the mouth of the Ohio river.

In fact, we think that it may be said that the entire current of authority supports the constitutional validity of taxation imposed for such a purpose as that here in question.

It is not denied, for instance, that the state may, in the exercise of the power of eminent domain, take from the unwilling proprietor the lands necessary for the building of this road—a road to be operated by a corporation for its "private profit;" that is conceded by all the authorities. Yet such a taking can only be supported upon the theory of a "public use" to be promoted by building the contemplated road.

Can there be a "use" which is sufficient, in a constitutional point of view, to seize the property of one, and at the same time insufficient to authorize taxation upon the property of all? If so, we have not found it.

In 1851, the court of appeals of the state of New York held that the public use which would support the exercise of the power of eminent domain would also uphold the power of taxation, and that really the power of taxation was in itself only one mode of taking private property for public use.

Upon this point the court said: "Private property may be constitutionally taken for public use in two modes: that is to say, by taxation and by right of eminent domain. . . . The right of taxation and the right of eminent domain rest substantially upon the same

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foundation. . . . Taxation exacts money or services from individuals as and for their respective shares of contribution to any public burden. Private property taken for public use by right of eminent domain is taken, not as the owner's share of contribution to a public burden, but as so much beyond his share."

We know that a distinction has, of late, been attempted between "public use" for purposes of eminent domain, and "public use" for purposes of taxation. In order to maintain the distinction, its authors have invented a new use, which is not exactly a public use, nor yet a private use, but a quasi public use. This quasi public use is of course something essentially different from the true "public use" named in the constitution, otherwise there would have been no necessity for the invention of a new use at all; for in this instance, as in others, necessity has proven to be the mother of invention. A quasi public use is, therefore, intended to be something more or something less than the "public use," pure and simple, mentioned in the constitution, for that was found to be insufficient to maintain the desired distinction.

Those who have originated the phrase "quasi public use," have, however, omitted to give it a definition. Quasi, we understand to mean "as if," "as though," "as it were," &c. A quasi public use may be said, therefore, to be a use "as if" a public use, "as it were" a public use, "as though" a public use, but of course in reality not a public use at all. In fact, the term is employed for the sole purpose of distinguishing a mere fictitious public use from a real public use, and thereupon it is argued that the unbroken line of authority which concedes that the power of eminent domain may be exerted in favor of the road as being for public use, does not establish that the power of taxation may be exercised for the same purpose, because it is said that the public use which will sup-

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port the former is not actual, but merely feigned—only quasi—but that the public use which is requisite to authorize taxation must be something more.

The result is that the license by which a citizen holds his money is of a higher and better character than the license by which he holds his land—reversing the rule by which the law is supposed to regard things real rather than things personal, and a “public use” to which one may lawfully refuse to contribute his money to-day is nevertheless one to which he may be compelled to surrender his house to-morrow.

But two or three of the courts in the United States have in fact attempted to maintain a proposition so absurd in itself. Those courts were lately characterized by the supreme court of the United States as “standing out in unenviable solitude and notoriety.” 1 *Wall.* 206. Among them at that time was the supreme court of Iowa. Since the submission of the case at bar we have, however, seen the opinion of that court rendered in *Stewart v. Supervisors of Polk County*, and not yet reported,* in which the distinction is exploded in the following language:

“The right to exercise the power of eminent domain in behalf of railroads and other improvements of public utility is recognized by all courts, and denied by no one. While admitting the right it is said that the legislature has no constitutional power to levy a tax on the property of the citizen in aid of a railroad corporation, because it is a mere private enterprise.

“It has been abundantly shown that the object for which the right of eminent domain is exercised is a public one, for public utility, for ‘public use,’ within the meaning of the constitution; and that this right can be exercised in behalf of these corporations on no other grounds. If, then, the building of a railroad is a

* Since reported. See 80 *Iowa*, 9.

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public object, so as to authorize the taking of the private property of the citizen—the highest species of property—for right of way, is it any less a public object for the purpose of receiving aid, through the medium of taxation, to assist in building the road upon such right of way? The right of eminent domain and the taxing power are both sovereign powers. The former is limited to public use by express words in the constitution. The latter is not, nor is it limited at all. . . . Conceding, however, that the taxing power ought not be exercised except in behalf of a public object, it is unquestionable that it may be exercised for public purposes—for any object that will justify the exercise of the right of eminent domain.

“If the state can, for any purpose, take the land of a citizen, it may tax him for a like purpose. The object or purpose should be a public one in either case. But it would be absurd to say that the right of the citizen to prevent his property from being taken for other than public uses, which is secured by express constitutional limitation, may be over-ridden; but that his right to save his money from being applied, through the process of taxation, to other than public uses, which right is not embodied in the constitution, must be respected. . . . If the taxing power can not be constitutionally invoked in aid of railroads, neither can the power of eminent domain.

“If the act under consideration is in conflict with the constitution in that it taxes the people in aid of the construction of railroads (or rather allows the people to tax themselves), then all the legislation in this and every other state exercising the power of eminent domain in behalf of railroads and other like internal improvements are unconstitutional, and all the adjudications of the courts, for more than a century, sustaining such exercise of the right of eminent domain, are based upon false premises, and are erroneous.”

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The able opinion from which we have thus quoted at such length is the more interesting in view of the fact that it is apparently the conclusion of a struggle between the legislature and the courts, of some eighteen years' duration in the state of Iowa, waged with varied success upon the very question now before us.

In the beginning of that struggle, which was in 1853, those who opposed the right of the people to vote upon the question of local taxation, placed it upon the ground it yet really occupies, notwithstanding the effort to mask it under an impossible distinction between a "public use" and a "quasi public use," so called. The argument which questions the legislative authority in this respect rests upon a fear, real or feigned, that the popular vote in a particular locality is not to be trusted with the question of local taxation for the purpose of local improvement. It looks really to a line of demarcation which it would draw between the rich and poor in the same community, and it would deny to the latter the power to participate in imposing a burden to be borne in part by the wealth of the former. When this question, for instance, first came before the supreme court of Iowa, in 1853, KENNEY, J., who then dissented from the opinion of the majority of the court, said: "If this doctrine is to obtain, then it is in the power of a bare majority of voters, destitute of property, to saddle a tax upon a minority, the only property holders in the county." But the judgment of that court, as then delivered, did not yield to the argument. *Dubuque County v. Dubuque, &c. R. R. Co.*, 4 *Iowa*, 1.

The court determined in that case that an act which authorized a popular vote with a view to the imposition of local taxation for local improvements was constitutional. In 1862, however, and after the personnel of the bench had been completely changed, the question was again presented, and a similar act was then held

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unconstitutional, and much upon the rich and poor idea announced by Mr. Justice KENNEY in 1853. The court said in 1862 that the expressed opinions of the supreme tribunals of some fourteen or fifteen of the states had reached conclusions "not satisfactory to the inquiries and consciousness of the public heart," and it declared that the question would continue to obtrude itself upon the courts until a decision was arrived at which "will leave the capital of private individuals . . . under the control and dominion of those who have it, to be employed in whatever field of industry and enterprise they themselves may judge best." *State v. Wapello County*, 13 *Iowa*, 393.

The history of the question in Iowa illustrates, too, that powers political are for the political representatives of the people, and not for the courts to exercise; for the authority of the legislature in the premises, now conceded by the supreme court of that state, had been repeatedly asserted by the legislature, and as often denied by the court for several years preceding the late decision in *Stewart v. Supervisors of Polk County*.

It is said, however, that in the case at bar the act is not "taxation," within the meaning of the constitution, because it is "simply taking the money of one man and giving it to another," and that therefore it is not the raising of money to meet "the public consumption or expenditure," nor to provide "for the use of the state, nor for the use or benefit of the state government." This proposition is based upon the alleged fact that the corporation which is to receive this money is a private and not a public corporation, and that the road itself, when built, is to be operated by the corporation for its own benefit and profit.

The general power of the state government to build such a road as this one is admitted. The authority to build it upon the basis here adopted is denied: it is claimed that the power to construct the road can not

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be exercised through the agency of the railroad corporation. It is not the power to construct, but the mode of its exercise, which is thus questioned. We might put this objection at rest by simply repeating the language of Judge BALDWIN, in delivering the unanimous opinion of this court in a case already cited, 17 *Cal.* 30: "But the legislative department, representing the mass of political powers, is no further controlled as to its powers, or the mode of their exercise, than by the restriction of the constitution." What provision of the constitution has declared that the legislature, in the prosecution of an enterprise *per se* of an admitted public character, shall employ no private agency, or shall take care that no private person shall derive a pecuniary profit thereby? or in what clause is there to be found a constitutional inhibition of the "mode" here adopted?

Too much prominence in argument here has, however, been imparted to this view to justify us in thus passing it by, conclusive as we deem the answer already given. At every step in the discussion upon the part of the city, we meet the multiform proposition that "public use" and "private profit" can not go hand in hand in the prosecution of this enterprise; that there is a fatal antagonism between the two; and that the moment that "private profit" lifts itself into view upon one side of the proposed work, "public use" must disappear from the other. In a case involving the same objection, the supreme court of Massachusetts said: "But it is said that this grant was made upon the petition and for the sole benefit of an individual, and was not needed for the accommodation of the public. It is doubtless true that the leading motive of the defendant in erecting the bridge was private profit, and so almost all other enterprises, many of which have resulted in great public improvements, have originated in motives of private gain." To our

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minds, however, the fallacy involved is so apparent that neither illustration nor argument can set it in a clearer light. It is exposed by a mere reference to the usual and ordinary mode of conducting the public business. Government habitually moves through the agency of employes in executing its purposes; these employes must be compensated in some way; and here we come, unavoidably in every instance, upon the specter of "private profit," which must, upon this view, frighten the government from the prosecution of any public enterprise whatever.

If an incorporated stage company, for instance, should put in a bid for carrying the mails at a fixed compensation, would any one doubt that it was the sole purpose of the company to obtain for itself a portion of the public moneys? Would any one attribute to it a motive of a less selfish character, or claim that a consideration of the public good had in the slightest degree actuated it in making its bid? Surely not. But, upon the other hand, if government should accept the bid at the proposed price, would not its known purpose be to promote a public service of recognized importance? Could any one claim that its object in providing for carrying the mail was less public in its character because the prosecution of that purpose incidentally afforded "private profit" to the stage company? Surely not; yet the case we have supposed has been of constant occurrence from the earliest organization of the government, in providing for the mail service.

We have instanced a familiar case by way of illustration. It might be indefinitely extended into all the varied circumstances in which government is to be supplied—to public printing, army stores, &c.—in all which private profit is the avowed motive on the one side, and the "public service" the true object on the other.

In 1831, the case of *Beekman v. Saratoga, &c., R.*

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R. Co., 3 *Paige* (N. Y.), 73, was decided by Chancellor WALWORTH. In that case it appeared that a railroad company, in constructing their road from Saratoga Springs to Schenectady, had seized upon certain real estate in the exercise of the power of eminent domain. There, as here, no question was made but that the state of New York might have built the proposed road herself, and might have appropriated the land in question, and applied the public moneys also for that purpose. The objection of Van Vechter, for the complainant (whose pleasure grounds around his country residence had been invaded), was that "the defendants are a private corporation, and the road when made will be private property ; it will not be for public use, but for the private use and emolument of the company," &c. In fact, the argument of the counsel for the complainant upon that point presented it with a force never surpassed in any case falling under our notice. The chancellor, in deciding the case, assumed, for the purpose of the decision, that the company was in truth a private company, in the exact sense claimed by counsel. He declares, however, that it belongs to the legislature to determine if the public interest will in any way be promoted by the taking of private property for such a purpose. He states that it is upon this principle that lands of one private individual are permitted to be overflowed and condemned in order that another may obtain a mill site ; and that not only agents of the government, "but also individuals and corporate bodies have been authorized to take private property for the purpose of making public highways, turnpike roads, and canals ; of erecting and constructing wharves and basins ; of establishing ferries ; of draining swamps and marshes," &c. In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improve-

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ment is to be effected directly by the agent of the government, or through the medium of corporate bodies, or of individual enterprise. And, according to the opinion of Chief Justice MARSHALL, in the case of *Wilson v. Blackbird Creek Marsh Co.*, 2 *Pet.* 251, "measures calculated to produce such benefits to the public, though effected through the medium of a private incorporation, are undoubtedly within the powers reserved to the states," &c. It must be observed that the chancellor in this case, following the view of the chief justice of the United States—each of them distinguished for learning and ability—holds that public improvements of this nature may be effected by the state government, "through the medium of corporate bodies or of individual enterprise." But how is this power to be availed of, if the corporation or individual selected for the purpose is to derive no "private profit" thereby? Can such service be obtained without pecuniary compensation in some way awarded? The counsel has not suggested in this connection that it would be possible to find a corporation or an individual so public spirited as to undertake an agency in effecting the proposed public improvement without the expectation of "private profit" to accrue, nor is it believed that even in the earlier day in which the chancellor and the chief justice lived private agencies of such a wholly disinterested character were to be readily found. When it is said, therefore, that the government possesses the power to prosecute a public enterprise through an agency private in its character, the power to compensate such an agency is at the same time necessarily conceded, for otherwise the power to make the employment would be practically incapable of execution, and a power incapable of execution is no power at all.

The power to compensate the private agency thus employed is therefore clear enough, and if this be so it

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must be admitted that the measure of that compensation and the mode in which it is to be afforded are mere details which will vary with the prevailing habits of the public service, the condition of the public treasury, or the mere policy which would seem to recommend one plan of making compensation as preferable to another plan. Suppose, for instance, that the entire gross proceeds of the business are to be paid into the treasury of the state, and the "private agency" by which the road was built and is operated is to receive from the state a sum equal to a fixed per centum of the ascertained cost of the road, with or without allowance for deterioration by use, as the case may be, or that the net profits earned by the road are to be equally divided between the state and the "private agency," or that the gross proceeds paid into the treasury shall be returned to the agency after certain deductions are there made; or suppose that the state is to have the authority to require that sufficient means of transportation for all persons and property to be carried shall be kept in readiness on the road, that so many trains of cars, of a designated character, shall regularly at stated times pass over the road; that the road shall be kept in repair at the expense of the corporation operating it, and without any expense to the state, and that as its "private profit" for rendering this service the "private agency" by which it is performed shall receive compensation from those who use the road at a rate not exceeding that which the state itself may from time to time prescribe. These, and an infinite variety of other methods which might be suggested, would be but different ways of effecting compensation for services rendered by a private agency in operating and maintaining a work of public use. Of the propriety of the mode of compensation adopted in a particular case it is for the legislature to judge, and we know no

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provision of the constitution which is violated in the mode adopted here.

The legislative and executive departments of the government seem to have deliberately reached the conclusion that a "public use" was to be promoted by the construction and operation of a railroad, such as the Stockton & Visalia road is designed to be, and, even if in so doing they have abused or mismanaged the constitutional authority over the subject, that circumstance would afford no justification to us for the assumption of unauthorized powers for the correction of such abuses.

No amount of supposed public good to follow would excuse us for the usurpation of powers not belonging to the judicial department of the government. "There is always some plausible reason (says BRONSON, J.) for the latitudinarian constructions which are resorted to for the purpose of acquiring power—some evil to be avoided, or some good to be attained by pushing the powers of government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. One step taken by the legislature or the judiciary in enlarging the powers of the government, opens the door for another that will be sure to follow; and so the process goes on until all respect for the fundamental law is lost and the powers of the government become just what those in authority choose to call them." 3 *Coms.* 568.

The power of the state government to foster and regulate internal improvements is unquestionable. Should we, in this instance, deny to the legislative department the possession of this power, or should we attempt to narrow its clear constitutional scope by applying to it the arbitrary measure of our own views of wise policy in the conduct of public affairs, we would, in the hope of accomplishing a temporary

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good, permanently mar the symmetry of the structure of the government itself, so far at least as a decision of ours could be permitted to work such an unfortunate consequence to the state. Though late events have awakened the general public attention to an anxious consideration of the extent of the legislative power upon this subject, those events have not as yet fixed a new limit to the power itself as it has heretofore existed, nor would they justify us in stepping aside from the well-beaten track which we follow to tread upon the new and strange paths into which some, though few, of our brethren of the bench have, we hope, but temporarily wandered.

No propositions in the case can be affirmed with greater confidence than that, under constitutions substantially like ours, railroads, though operated by private companies, are by mere legal conclusion, for "public use;" that the power of eminent domain, confessedly exercisable only in behalf of "public use," may therefore be exerted in behalf of railroads under legislative permission; that as fostering the "public use," aid may be extended to the construction of such roads by means of the power of eminent domain or of subscription to capital stock, and by donations made by cities and other political subdivisions of the state, under the authority of the legislature first given (or subsequently obtained, as was held in 1843 by the supreme court of Connecticut, in *Bridgeport v. Housatonic Railroad*, 15 Ct. 475), and such is the purport of the judicial decisions of the highest courts of Virginia, Connecticut, Pennsylvania, Ohio, Indiana, Tennessee, Illinois, Kentucky, New York, Georgia, Florida, Texas, Mississippi, Missouri, South Carolina, and other states. These decisions cover a period of little less than half a century of time; and they embody the views of constitutional law with reference to the question before us, which were entertained by some of the most dis-

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tinguished jurists who have shed luster upon the American bench. They are cited in the briefs, and will be found to be not the mere expression of conclusions reached upon the points involved, but, in many instances, elucidated by a learning and research absolutely exhaustive of the general principle of the law of taxation as applied to the system of government under which we live.

Upon authority, and upon principle as well, we think that the act in question can not be said by us to be, in any sense, unwarranted by the constitution, or beyond the authority of the legislature to enact.

It is ordered that the writ of mandamus issue as prayed for.

CROCKETT, SPRAGUE, and TEMPLE, JJ., concurred.

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50 *Missouri*, 600.

Supreme Court of Missouri; October Term, 1872.

Municipal corporations. Subscriptions to stock of railway companies.

Where bonds are issued by a county to raise funds for a subscription to the stock of a railway company, although the railway intended is not designated by name in the proceedings of the county court, yet if there is reasonable certainty in the ordering of the subscription, and the subscription is actually made to the railway authorized, the bonds issued are not, on that account, invalid.

Appeal to the supreme court of Missouri from the circuit court for Cape Girardeau county.

This was an action of trespass against a sheriff,

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upon facts stated in the opinion. Judgment was rendered for the plaintiff; from which the defendant appealed.

Lewis Brown, for the appellant.

Louis Houck, for the respondent.

WAGNER, J.—The defendant was sheriff and collector of Cape Girardeau county, and as such coerced the payment of sixty-seven dollars from the plaintiff, being the amount of a special tax levied on his real estate in Cape Girardeau township, to pay off the accruing interest on certain railroad bonds issued by the county on behalf of the township. The plaintiff then instituted this action in trespass against the defendant, alleging that the bonds were illegal and void, and issued without any authority of law.

The answer sets out in detail all the proceedings which led to the issuance of the bonds to show their legality. It recites the petition of at least fifty citizens, tax-payers and residents of Cape Girardeau township, to the county court, stating that they were desirous of having more railroad communications, and that the legislature had changed the charter of the I. M., C. G., & B. Railroad, permitting the road to start at the city of Cape Girardeau, in said township, running in a southwest direction through the township, thence by way of Whitewater, through or near Bloomfield, in Stoddard county, Mo., to some desirable point on the state line, granting to the road franchises equal, if not superior, to any railroad in the state. The petitioners then stated their belief that the tax-payers of the township were willing to subscribe one hundred and fifty thousand dollars to the capital stock of the said railroad enterprise, the same to be in bonds of sufficient denomination, payable in twenty years, bearing interest

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at the rate of eight per cent., payable annually. The petition then asked the court to order a special election for the purpose of ascertaining the will of the voters of said township in relation to such subscription. Upon the presentation of the petition, the court made an order reciting the substance thereof, stating that it prayed the court to order an election to test the willingness of the people of said township whether or not the court should subscribe the sum of one hundred and fifty thousand dollars, in behalf of said township, for the purpose of constructing a railroad commencing at the city of Cape Girardeau, running in a southwest direction to some desirable point on the state line.

The order reciting the terms of the proposed subscription stated the amount, the number of years the bonds were to run, the rate of interest, when payable, and in all things conformed to the petition. It provided for an election in accordance with the law controlling elections, required the necessary notices, and appointed judges. The election was regularly held, and three hundred and seventy-six votes were cast for subscription and seven votes against it. The abstract of the vote was certified to the county court, and thereupon it was ordered that the court subscribe one hundred and fifty thousand dollars, in the name of the county, for and in behalf of the said township, to the capital stock of the company, on the terms heretofore stated, which were set out in full. The whole proceeding was strictly in pursuance of the statute. *Wagn. Stat.* 313, § 51 *et seq.*

The assessment and levy, which is the subject of this suit, was made for the purpose of paying the annual interest on the bonds. On motion of plaintiff the court struck out all that part of the answer setting up the petition, the orders of the court, the election and subscriptions, as constituting no defense to the

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action, and then gave judgment against the defendant.

In support of the judgment of the court below it is contended that the whole proceeding was void for indefiniteness; that no particular road was designated, either in the petition or order of court, and therefore the action of the county court was simply a nullity.

Id certum est quod certum reddi potest is a well established maxim of law. That is sufficiently certain which can be made certain; and this may be done either by express words, or by words which may by reference be reduced to a certainty. In *State v. Saline County*, 45 *Mo.* 242, no sum was specified, the voters left the amount undetermined, and there was nothing to show an intention on the part of the voters to subscribe for any particular amount; consequently, no tribunal was authorized to infer or assume that any sum was intended. In the case of *Marsh v. Fulton County*, 10 *Wall.* 676, the law of Illinois authorized counties to subscribe to the capital stock of railroad companies and to pay for the same in county bonds, provided such subscriptions were previously sanctioned by a majority of the qualified voters of the county. The board of supervisors of Fulton county submitted the question to the voters, whether the county should subscribe seventy-five thousand dollars to the capital stock of the Mississippi & Wabash Railroad Company, and after the election ordered the clerk to subscribe the stock and issue the bonds. Subsequently the legislature changed the charter of this company, separated the road into three divisions, and authorized the stockholders in each division to elect separate boards who should each manage its own division. After this separation the clerk made the subscription to the central division, and the court decided that this division was a different corporation from the one to whose stock the board of supervisors, under the authority of the

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election, had ordered him to subscribe, and that the subscription was not authorized by the vote. The people authorized the subscription to be made to the capital stock of one company, and the clerk made the subscription to the stock of another company. This he had no power to do.

The two cases just referred to show that there must be reasonable certainty in the matter of voting and ordering the subscription, and that the subscription must be made to the road authorized in the power delegated to the agent. Tested by these principles, we think the subscription in this case was entirely valid. The original petition, which was the inception of the proceeding, stated that the charter of the I. M., C. G., & B. Railroad had been changed so as to make it start at the city of Cape Girardeau, and run in a southwest direction, through or near Bloomfield, to the state line. By reference to the act it will be seen that the charter of the corporation spoken of was changed so as to be called the "Cape Girardeau & State Line Railroad," and power was given it to construct a railroad from the city of Cape Girardeau, in a southwesterly direction, through or near the town of Bloomfield, in Stoddard county, to the state line, *Sess. Acts*, 1869, 77.

This was the road directly mentioned in the petition, and all the subsequent orders and proceedings speak of a road commencing at the city of Cape Girardeau and running in a southwesterly direction, &c. There is no pretense that there was any other road in existence or contemplated. The references and intention are unmistakable and are sufficiently certain.

As no other fault is found with the proceeding, and as every step taken seems to have been done in a formal and regular manner, I entertain no doubt about the validity of the subscription. The objections urged are entirely too refined and technical. The court erred in striking out the answer and assuming

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that it constituted no defense, and its judgment will be reversed and the cause remanded.

All concur.

Judgment reversed.

HENRY COUNTY v. ALLEN.

50 *Missouri*, 231.

Supreme Court of Missouri ; July Term, 1872.

Municipal corporations. Subscriptions to stock of railway companies.

Where, in order to pay a subscription by a county to the stock of a railway company, the county court levies a tax and appoints an agent to receive the money collected, and to pay it over when ordered by the county court, the railway company has no lien upon the money collected and in the hands of the agent, but not ordered to be paid over; and the money may be recalled by the county at any time before payment to the company.

Appeal to the supreme court of Missouri from the circuit court for Henry county.

This was an action for the recovery of money alleged to have been received by the defendant as agent of the plaintiff. The Pacific Railroad Company interpleaded, claiming the money as its own. The facts are stated in the opinion. Judgment was rendered against the defendant, and against the claimant on the interplea; and both appealed.

Hicks & Phillips, for the appellants.

H. B. Johnson, and *F. P. Wright*, for the respondent.

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ADAMS, J.—This was a suit for the recovery of a sum of money from the defendant, which he is alleged to have received as agent of the plaintiff and refused to pay over to plaintiff on demand. The Pacific Railroad Company was allowed to interplead in the case, and did so, claiming the money in the hands of defendant as its money. The case was determined in favor of the plaintiff, and judgment rendered against the defendant for nine hundred dollars, balance of money in his hands, and also judgment on interplea against the claimant, and the defendant and claimant have brought the case here by appeal.

The facts are substantially as follows: In 1855, the county court ordered a subscription to the capital stock of the railroad company for fifty thousand dollars, and appointed George R. Smith to make the subscription, which was done. The county court afterwards levied a tax to be collected to pay the calls that might be made on this subscription, and appointed the defendant, Allen, as agent of the county to represent its interests in all matters connected with the subscription; "to receive the money from the county for the calls of the company for the stock subscribed by said county, and pay the same over to the company *when ordered by the court*, and superintend all the transactions necessary between said county and said Pacific Railroad Company, according to law and the order of the county court; and that he entered into bond to the county of Henry in the sum of twenty thousand dollars for the faithful performance of his duty."

The defendant accepted this appointment, gave the bond, and entered upon the discharge of his duty; received from the collector, under this appointment, over three thousand dollars, and paid it over to the railroad company, on the call of the company, except the sum of nine hundred dollars which was in his hands

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at the commencement of this suit. The county court, after the payments referred to, assumed to make an order on its records annulling the subscription and ordering its agent, Allen, to pay over the balance of the money in his hands into the county treasury.

Many questions have been elaborately argued by the learned counsel for plaintiff, defendant, and claimant, which, in the light I view this case, it will be unnecessary to pass on, as they do not properly arise on this record, and anything that might be said would be merely *obiter dicta*.

The validity of the subscription to the railroad company is not involved in this case, and could only arise in a direct proceeding by the company against the county to collect the subscription. Nor is it necessary for us to decide whether the former suit by the Pacific Railroad Company would be a bar to a new suit to enforce payment of the subscription. Nor is it necessary for us to decide whether tax-payers were bound to pay taxes levied to pay the calls on the subscription.

The county court assumed that the county was indebted for the amount of the subscription, and proceeded to levy and collect taxes for payment of this indebtedness of the county. The money, when so collected, belonged to the county for the purpose of paying this alleged indebtedness. It went into the hands of the defendant, as agent of the county, to be paid over on the call of the company, under the order of the county court. The Pacific Railroad Company had no specific or other lien on this money. It was the money of the county, in the hands of its agent, and could be recalled at any time before payment to the company.

Where a principal places money in the hands of his agent to pay a debt, it does not become the property of the creditor. It remains in the hands of the agent, subject to the orders of the principal, and it is the

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duty of the agent to obey such orders. When the defendant refused to pay over the money to the county treasurer, as ordered by the county court, he became liable to this action for the amount remaining in his hands.

All concur.

Judgment affirmed.

STATE OF MISSOURI v. SALINE COUNTY
COURT.

51 *Missouri*, 350.

Supreme Court of Missouri; January Term, 1873.

Municipal corporations. Subscriptions to stock of railway companies. Proceedings to restrain the officers of a county from issuing bonds or warrants of the county in payment of a subscription to the capital stock of a railway company, and from levying or collecting any taxes for the purpose of paying such bonds or the coupons thereon, or such warrants, may be maintained by the state, through its proper officers, where such acts are in violation of the constitution and laws of the state. The writ of quo warranto affords an ample remedy for misuse of its powers by a *private* corporation; but the power of the state to restrain *public* corporations from a violation of law will be sustained.

The original charter of a railroad company, granted by a state legislature, authorized it to construct a railroad by a designated route to a certain river, and also allowed "any county in which any part of the route of said railroad may be," to subscribe to the stock of the company. Subsequently a new state constitution was adopted, which provided that the legislature should not authorize "any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a

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regular or special election, assented thereto." After the taking effect of this constitutional provision, an act was passed as an amendment to the original charter, authorizing the extension of the road beyond its terminus at the river mentioned in the original charter, through counties not on the route designated in that charter. *Held*, that these counties were not authorized by the amended charter to subscribe to the stock of the railroad company, without submitting the question to vote, as provided in the constitution. No legislative act could give those counties a power prohibited by the constitution after its adoption, which they did not possess at the time it was adopted.

Appeal to the supreme court of Missouri from the circuit court for Saline county.

This was an action to restrain county officers from issuing county bonds, or warrants, or levying taxes for the purpose of paying a subscription by the county to the stock of a railway company. The facts set forth in the petition and in the answer of the defendants are stated in the opinion. Upon a hearing, on the petition and answer without further proof, a perpetual injunction against the defendants was granted. The defendants appealed.

Sharp & Brodhead, with whom was *Thomas J. C. Flagg*, for the appellants.

Warner, Circuit Attorney, with whom was *W. B. Napton*, for the respondents.

SHEPLEY, SP. J.—This is an action brought in the name of the state, by the circuit attorney of the sixth judicial circuit, against the county court of Saline county and its judges, and the collector of Saline county, to restrain the county court and its officers from issuing bonds to the Missouri & Louisiana Railroad Company, or any county warrants, in payment of their subscriptions to the capital stock of that company, and from the levying or collecting any taxes for the purpose of

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paying such bonds, or the coupons thereon, or such warrants.

The petition sets forth, that on February 7, 1869, the county court of Saline county undertook to subscribe four hundred thousand dollars to the capital stock of the Louisiana & Missouri River Railroad Company; that the said railroad company was incorporated in 1859, and by the terms of its charter it was provided that "it should be lawful for the county court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company." That the route of the railroad, designated in that act, was a route wholly on the north side of the Missouri river, and did not run through or into the county of Saline on the south side of the river. That the county court of Saline county, did, on February 7, 1868, make its subscription, professing to act under the permission given by the act of 1859. That this was done without ever having submitted the matter to the voters of Saline county for their assent, and was in violation of section 14 of article 11 of the constitution of the state. That after the subscription was made, and on March 14, 1868, the legislature passed an act purporting, by its title, to be an act amendatory of the former charter of the railroad company. That this act is void, as conflicting with section 4 of article 8 of the constitution, and with section 32 of article 4, and that section 20 of the act, if valid, conferred no authority upon the county court of Saline county to subscribe for stock. That their subscription was without any authority of law, was an usurpation of power, was at variance with the letter and spirit of the constitution, and of the laws of the state. That the county court have already issued some bonds to pay for the subscription, and threaten to issue others. That the county court have assessed and levied taxes for the purpose of paying the bonds and interest. and have in-

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cluded the tax so assessed in the general county taxes against the individual tax-payers, so that it can not be separated, and that the whole scheme was a fraud upon the tax-payers. That if any remedy existed at all to the tax-payers, it is by a multiplicity of suits by each tax-payer for himself. That the tax-payer can not tell what part of the tax assessed against him is illegal; praying that the county court and its officers be restrained from issuing any more bonds or warrants for that purpose, and that the officers and collector be restrained from levying, assessing, or collecting taxes for the payment of such bonds or warrants, or the interest thereon.

The defendants answered, denying the illegality of their action in the matter of the issue of these bonds, claiming that they had full power to make the subscription, under the original charter of the railroad. That the route, as designated in that charter, was not wholly or exclusively on the north side of the Missouri river, but that the directors had the authority to locate the route from Louisiana to any point in the state of Missouri, whether on the north or south side of the river; and that before the subscription the directors had located it from Louisiana to Kansas City. That Saline county was on the route of the road thus located.

They deny that the act of March 24, 1868, called the amendatory act, is void or in conflict with the constitution of the state, or the subscription illegal, or the bonds void.

The case was heard upon the petition and answer without further proof, and the court made the preliminary injunction perpetual, and the defendants appealed.

The question that lies at the threshold of this case is, whether such a proceeding as this is can be maintained by the state.

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It is asserted by the plaintiff that it is competent for the state, through its authorized officers, to institute this proceeding to restrain public corporations from doing acts in violation of the constitution and laws of the state.

On the part of the defendants, it is contended that the attorney-general or the circuit attorneys, in their respective districts, have no authority by statute to institute such a proceeding in the name of the state. That if such power exists at all, it exists by virtue of the common law, and that by the common law such interference on the part of the state is confined to two classes of cases—one being that of public nuisances, and the other being the administration of charitable trusts.

The question is obviously one of great importance. Though, as will be seen hereafter, it has been considered and decided in the courts of other states, it has received the most elaborate examination in the courts of the state of New York, and especially in the case of *Davis v. Mayor of New York*, 2 *Duer* (N. Y.) 663, and in the case of *People v. Miner*, 2 *Lans.* (N. Y.) 396.

The case in 2 *Duer*, 663, was brought by two taxpayers against the mayor and others, to restrain the construction of a street railroad upon Broadway, for the doing and operating of which the municipal authorities of the city had given authority to the individual defendants, under their general power over the streets of the city. The court decided that it was not a public nuisance, but that when any act of a municipal corporation is sought to be restrained or annulled as a violation of its charter, or breach of trust, or an excess of power, the attorney-general was a necessary party, either prosecuting alone or in conjunction with or upon the relation of individual corporators, and required that the attorney-general should be made a party to the proceeding. After examination Judge DUEB arrives

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at the conclusion that at common law the attorney-general in England could institute proceedings to restrain public and private corporations from exercising powers not granted and from the abuse of those granted; and to sustain his position cites 2 *M. & C.* 129; *Id.* 613; S. C., 1 *Kane*, 153; 4 *M. & C.* 17; S. C., 2 *Keene*, 190; 1 *M. & C.* 171; 8 *Sim.* 193, 373; 9 *Id.* 30, 36, 56; 13 *Id.* 547; 16 *Id.* 228; 1 *Bligh N. R.* 312.

In the subsequent case of *The People at the relation of the Attorney-General v. Miner*, 2 *Lans.* 396, which was a suit brought to restrain the commissioners of the town of Augusta from subscribing to the capital stock of a railroad, the supreme court of the fifth district held that the action could not be maintained. Judge MULLEN, in delivering the opinion of the court in that case, while conceding that the decision of the court in the case in 2 *Duer*, 663, was correct, yet denies that the conclusions reached by Judge DUER in his opinion in that case as to the power of the attorney-general in England, are maintainable or warranted by the decisions he quotes. He undertakes to define or classify all the powers possessed by the attorney-general in England, the only two of which, as stated by him, relating to this matter, are by writ of *quo warranto* to determine the right of him who claims or usurps any office, franchise, or liberty, and to vacate the charter and annul the existence of a corporation for violation of its charter, or omitting to exercise its corporate powers, and by *information to chancery* to enforce trusts and to prevent public nuisances and the abuse of trust powers.

He examines all the cases cited by Judge DUER (except the case in *Bligh N. R.*), and undertakes to show that they are all cases of an abuse of trust or a misapplication of trust funds, and are maintainable

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under the general equitable authority of the court over trusts.

But if that be conceded, how does it show that Judge DUER is mistaken? Every misapplication of public funds and every abuse of power by public bodies is in one sense an abuse of a trust. These trusts are certainly not charitable trusts and it is not contended that the attorney-general has power to institute such proceedings over all trusts, private as well as public. How, then, had the attorney-general a right to interfere here about these so-called trusts? Not certainly because they were trusts, but because they were trusts in which the public were concerned.

The case which Judge MULLEN did not examine, not being able to find it, is the case of the Attorney-General v. City of Dublin, 1 *Bligh N. R.* 312, incorrectly quoted by Judge DUER as in 2 *Bligh N. R.*

It so happens that in that case, which was an appeal to the house of lords, this question distinctly arose, and the objection was made that it was not maintainable on the ground that it involved no matter of trust. The lord chancellor and Lord REDESDALE, who both gave opinions in maintaining the jurisdiction, refused to place the jurisdiction on the ground of a trust, but placed it upon the general ground that the state had the right to prevent the doing of illegal acts by public and private corporations. Lord ELDON referred to the case of the Attorney-General v. Browne, 1 *Swans.* 255, as showing that the jurisdiction was not there placed upon the ground of a trust.

But more recent cases in England have removed any obscurity, if any there be, as to the ground of the jurisdiction maintained there.

The case of Attorney-General v. Great Northern R. Co., 1 *Dru. & S.* 154, was the case of a bill brought to restrain a railway company from buying and selling coal, and the jurisdiction was there upheld, and the

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vice-chancellor placed the decision on the ground that though in that case any shareholder might file a bill, yet that in the matter of the abuse of corporate powers, or the exercise of powers not granted, the public sustained an injury, and it was competent for the attorney-general, *ex officio*, or on relation, to file an information to restrain it.

In the case of Attorney-General v. Mid. Kent R. Co., 3 *L. R. Ch.* 100, which was an appeal in chancery, an information was brought by the attorney-general to compel the railroad company to make certain slopes of a certain gradient on the line of its road, in conformity with the requirements of its charter, and it was objected that there was no jurisdiction. Both Lord CARNES and Sir JOHN HOLT gave opinions sustaining the jurisdiction, placing it upon the broad ground before mentioned.

In the case of Stockport District Water-works v. Manchester, 9 *Jur. N. S.* 266, which arose on a contract between the city and an aqueduct company to carry water beyond the limits which the city was authorized by law to supply, Lord WESTBURY said he would not hesitate to act upon the information of the attorney-general.

The jurisdiction has been asserted in the recent case of Hare v. London & N. W. R. Co., 2 *Johns. & H.* 111; Liverpool v. Chorley Water-works Co., 2 *De Gex, Man. & G.* 852, at 860; Ware v. Regent's Canal Co., 3 *De Gex & Jones*, 212, at 228.

In a recent case—Attorney-General v. Commissioners of West Hartlepool, 10 *Law R. Eq.*, 152 (1870)—which was a case brought by the attorney-general at the relation of certain rate-payers against the commissioners to restrain them from diverting the funds of the town to the procurement of parliamentary legislation, the jurisdiction was sustained and the relief

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granted. Here was simply an abuse of corporate powers which was sought to be restrained.

In none of these decisions is there the slightest hesitation in placing the jurisdiction upon the broad ground, that the state had the right in this form of proceeding to restrain all corporations, public and private, from the abuse of powers granted, or from exercising those not granted.

The decision arrived at in 2 *Duer*, and the principle there maintained, has been approved by the court of appeals in the state of New York, in the cases of *Doolittle v. Supervisors of Broome County*, 18 *N. Y.* 162, and in *Roosevelt v. Draper*, 23 *Id.* 324, as also by the supreme court of the first district, in *Roosevelt v. Draper*, 16 *How. (N. Y.) Pr.* 100 ; by the supreme court of same district in case of *People v. Lowber*, 7 *Abb. (N. Y.) Pr.* 158, and in *People v. Mayor of New York*, 10 *Abb. (N. Y.) Pr.* 144 ; by the supreme court of the third district, in *People v. Mayor of New York*, 32 *Barb. (N. Y.)* 102, and the supreme court of Pennsylvania, in 50 *Pa. St.* 100, as also by the supreme court of the state of Illinois, in the case of *Board of Supervisors v. Keady*, 34 *Ill.* 296.

The question was presented in Massachusetts, in the case of *Attorney-General v. Salem*, 103 *Mass.* 140, and it was decided that if, in Massachusetts, the jurisdiction existed, no case was made for its exercise ; and also that, under the limited equity jurisdiction given in Massachusetts by their statutes, it probably was not conferred upon the attorney-general to institute such a suit.

If the case of *People v. Miner*, 2 *Lans. (N. Y.)* 397, be supposed to decide that the state can not institute such a suit as the present, then it seems to me that it can not be sustained. But I do not so understand the decision in that case, though it is difficult to say just how far the court goes in this matter of jurisdiction.

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That case was to restrain a town from subscribing to the stock of a railroad company, as being beyond the powers granted in their charter; and the court, while stating, at p. 407, that "it does not mean to be understood as denying the right of the attorney-general to apply to restrain corporations from exercising franchises not granted," decides the case against the right claimed in that particular case, upon the ground that the defendants were expressly authorized to borrow money, issue bonds, and subscribe for stock, and the only question was whether they had properly exercised the powers expressly granted.

But here there is no franchise, privilege, or power, either general or special, granted to this county court to subscribe for any stock whatever, but if conferred at all, it is a legislative authority to subscribe to the stock of a certain railroad company, and, as is alleged, under certain limitations not complied with.

It was urged on the argument, with great force, that such a power on the part of the state was a very dangerous one; that there was no necessity for its exercise, as the persons whose rights were affected were perfectly competent to protect their rights, and the law afforded them a complete and adequate remedy.

It is conceded that a corrupt officer, in refusing to institute any proceeding when there was clear violation of law or constitution, or in putting it in motion when there was no valid ground for its exercise, might use his office oppressively; but this is no more than saying that any person or officer, to whom large powers are confided, may oppress. The remedy lies in seeing that honest and incorruptible men are put into public places, and especially so in those connected with the administration of justice.

But there is another consideration that is entitled certainly to as much weight as that growing out of a possible oppression, and that is the necessity that now

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exists of providing ample and efficient means for restraining public corporations from misusing powers granted, and usurping powers not granted.

To the argument that in this and similar cases, the tax-payer has a complete and efficient remedy for the alleged violation of the law and the constitution, it is to be said that it is no argument against the right of the state to prevent public corporations from violating the law, that private individuals have the same right when their private interests are affected. The state has interests apart from and, it may be, antagonistic to those of the individual corporator. It may be to the interest of every individual corporator that the corporation should exercise powers not granted and even prohibited by the constitution, but it is the right and the duty of the state to see that these public corporations do not willfully violate the constitution or the law. If the redress is to be confined wholly to legislation, then it might be wholly ineffectual, especially in those states where the legislature meets but in every two years.

It is worth while briefly to examine what remedy the tax-payer has in such a case as this, if the subscription be illegal and void, according to the decisions of this court.

It has been decided that certiorari will not lie, *State v. Saline County*, 45 *Mo.* 52; nor prohibition, *Vitt v. Owens*, 42 *Mo.* 512; nor will injunction lie at the suit of a tax-payer, to enjoin the assessment, levy, or collection of a tax, however illegal or void. 23 *Mo.* 443; 20 *Id.* 136; 21 *Id.* 216; 22 *Id.* 90; 46 *Id.* 394; 47 *Id.* 474; 48 *Id.* 175; 48 *Id.* 525.

If a levy has been made for an illegal tax, if the warrant contains any part of the tax which is legal, or the property is liable to taxation in any form, the tax warrant protects the officer, and no recovery can be had. 43 *Mo.* 479; 47 *Id.* 393, 462; 48 *Id.* 282.

The remedy as to illegal taxation seems to be con-

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fined to this: That if the tax-payer has real estate, and the collector is not able to make it out of his personal property, he can, when his real estate is about to be sold, enjoin the sale. 24 *Mo.* 20; 37 *Id.* 228; and it seems to be held, in the case of *Steines v. Franklin County*, 48 *Mo.* 176, that though the tax-payer has not the right to enjoin the assessment, levy, or collection of an illegal tax, he can maintain a bill to declare the contract void, to cancel the bonds, and restrain their payment, sale, and transfer.

But in such a case he must give a bond and incur a responsibility, often to the amount of tens of thousands of dollars, while he is only interested to the amount of hundreds, at most.

It is possible, too, for the corporation, conscious that they are about to do an illegal act, to take such steps that the act is done, and the bonds issued are beyond the jurisdiction of the court, so that it is very difficult, if not impossible, for the tax-payer to obtain redress.

I can not think that there is furnished any effectual protection to the tax-payer from being compelled to pay an illegal tax, or to the state for the violation of the constitution or the law.

But it is further urged that the supreme court of the state has already decided against the jurisdiction here claimed, in the case of the State at the relation of *Connelly v. County Court of Platte county and Parkville & Grand River Railroad Company*, 32 *Mo.* 496. This was a proceeding brought in the name of the state, to restrain the county from issuing bonds to the railroad company as not authorized by law, brought, not by the attorney-general, or the circuit attorney, or at their instance, but by some citizens of the state, who undertook to use the name of the state without authority in their suit; and beyond question, the case was rightly decided. The question arose upon a demurrer

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to the petition, and one of the grounds for sustaining the demurrer is thus stated: "There is nothing in the petition which shows or pretends to show that the state of Missouri has any interest, legal or equitable, in the subject-matter of the controversy, and the suit was improperly brought and can not be maintained in the name of the state;" and this is all that is said in the subject in the opinion. That the state had no pecuniary interest may perhaps be conceded, but the question was not raised or considered whether the state, acting through its legal officers, can not restrain its public corporations from violating the constitution and the laws.

It seems to me that, both on principle and authority, this proceeding is maintainable; and that while, in the case of a private corporation, the courts in this country will sustain the conclusions arrived at in 2 *Johns. (N. Y.) Ch.* 371, in 103 *Mass.* 138, and 104 *Id.* 239, that the writ of *quo warranto* affords an ample and efficient remedy for any violation of its charter, or misuse or abuse of its powers, and, therefore, that this form of proceeding will not lie, the power of the state, through its proper legal officers, to restrain public corporations from a violation of the law will be sustained.

In the case of *Attorney-General v. Salem*, 103 *Mass.* 138, the court held that the writ of *quo warranto* did not lie against a public corporation, and unless we are prepared to admit that the state has no other remedy for the willful and flagrant violation of laws by a public corporation, than by legislation, then the law which appears for the first time in the revision of 1865, and is efficient both for the state and the individual, gives the power to the state to use the remedy by injunction, when it provides, 2 *Wagn. Mo. St.* 1032, that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or per-

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sonal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy can not be afforded by an action for damages.

Having arrived at the conclusion that this form of remedy is maintainable by the state, we come now to consider whether the state has made such a case as will allow its application here.

By section 14 of article XI. of the constitution, which took effect on July 4, 1865, it was provided, "that the general assembly shall not authorize any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election, assent thereto."

This subscription of four hundred thousand dollars by Saline county to the stock of this railroad company was made after the taking effect of the constitution, and without any assent of the qualified voters being obtained to such subscription. Was the subscription, so made, valid?

This court, in the case of *State ex rel. The Missouri & Mississippi Railroad v. Macon County*, 41 *Mo.* 453, where the charter of the railroad, passed before the adoption of the new constitution, gave power to counties on the line of this route to subscribe without limitation, held that section 14 of article XI. of the constitution was a limitation on the *future* power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted, and decided that though Macon county made its subscription to the company after the adoption of the constitution, and without any submission to the qualified voters, the subscription was valid.

A similar provision as to the subscription without

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limitation, is found in the charter of the Louisiana & Missouri River Railroad Company, passed in 1859, and the first question that is presented is, whether Saline county, situated on the south side of the Missouri river, is, by the terms of the original charter of this railroad company, authorized to subscribe to the stock of that company.

The route of the railroad, as fixed by section 35 of the original charter, is in these words, *Session Acts 1858-9*: "Said company shall have the power to mark out, locate, and construct a railroad from the city of Louisiana, in the county of Pike, by way of Bowling Green, in said county, to some suitable point on the North Missouri Railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgomery county, and the northern limits of the town of Mexico, in Audrian county; thence to the Missouri river at the most eligible point, on a line the most suitable and advantageous," &c.; and by section 29 it is provided "that it shall be lawful for the county court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company," &c.

It is set up in the answer, and contended here, that the words cited, authorized the railroad company to *cross* the Missouri river and continue its road on the south side of the river till it strikes Kansas city, on the south bank of the Missouri, and some words in the charter in relation to the bridging of navigable streams are seized on to show that, (as is asserted), as there are no navigable streams on the north side of the river within the state, it was the intention of the legislature that the company might cross the Missouri river and bridge navigable rivers on the south side.

It is sufficient to say that neither the words used nor the plain intent of the act will admit of any such construction. When a railroad is authorized to be

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built to a town, it stops there, and certainly no authority is thereby given to construct a road *through* the town to a point some miles away, and then returning to the designated town again. When authority is given to construct a railroad *to* a river, wherever it first strikes the river there it must stop. If congress had authorized a railroad to be constructed from the west line of the state of Missouri through Topeka to the one hundredth degree of west longitude, such a construction would not allow that railroad to be constructed across that parallel to Denver, and return to some other point on the one hundredth parallel.

But if the original charter did not confer power upon Saline county to subscribe, it is contended that such power is found by virtue of what is claimed to be an amendment of this railroad charter, passed in 1868, extending and changing the route of the railroad; that such an extension and change of the route is but an amendment to the original charter, which it was entirely competent for the legislature to make since the adoption of the new constitution prohibiting the granting of special charters, as was held by this court in the case of *The State, at the relation of Circuit attorney, v. Cape Girardeau & State Line Railroad*, 48 *Mo.* 468.

If it be conceded that this act of March 24, 1868, was a perfectly valid and legal amendment to the original charter of the company, does it produce the result proposed?

The power of the county court of Saline county to subscribe for the stock of this company, if it exists, must be derived from the power in the original charter—no substantive grant of power after the new constitution took effect, being possible.

How, then, stands the case?

The power, given by the charter, of subscription by the county court is in these words: "It shall be lawful for the county court of any county in which any part

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of the route of said railroad may be, to subscribe," &c.

The power, therefore, given to subscribe is not to the counties upon the line of any railroad that may be constructed by the *corporation thereby created*, but to the counties upon "the route of said railroad," as thereby authorized; that is, on the route of the railroad as provided for and designated in section 35 of the original charter. The legislature might, by amendment, afterwards allow an extension of that railroad, or branches to that road, but those counties on the line of the extension or branches could not be on the line of "the route of said railroad," as originally designated.

There is another objection to the power here claimed (conceding this to be a valid amendment), which is equally fatal. If the power to subscribe, as originally granted, had been a general one and not confined to the route marked out by the charter, yet, as at the adoption of the constitution there had been no change of the route, the power of subscription was confined to the counties on the designated route, and they could subscribe without submission to the qualified voters after the taking effect of the new constitution, because at the taking effect the power already existed. But because, after the adoption of the constitution, the legislature can amend the charter by extending the route, does that give a power of subscription on the line of the extension which they did not, at the time of the adoption of the constitution, have? This is the effect claimed for it, and the result would be the conferring upon counties of a power prohibited after the adoption of the constitution, which they did not possess at its adoption. That this is perfectly clear, seems to me when we consider that under the construction of the original charter, given in this decision, the company at the time of the adoption of the constitution was confined to the north side of the river, and at that

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time no counties on the south side could subscribe, even if the permission had been given to subscribe to the railroad that might be constructed by the company. So that no right of subscription without submission existed at the adoption of the constitution, in these counties on the south side, and that power must have been acquired by the force and effect of some act passed after the adoption of the constitution, and the constitution prohibits such effect.

But these are not the only fatal objections to the legality of this subscription.

The act of March 24, 1868, *Sess. Acts of 1868, 77*, can not be considered as an amendment to the original charter. With the exception of the title of that act (unless it be claimed that a few words in the last section of the act refer to the original corporation, but which may as well refer to a corporation created by that act), there is not a single word in that act that refers to or mentions, or in any manner connects it with the original charter or the company formed thereunder. The title of the act is this: "An act to amend an act entitled 'an act to incorporate the Louisiana & Missouri River Railroad Company,' by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said board the necessary powers to carry into effect the several objects contemplated by this charter; and also by striking out sections 11, 18, 27, 30, and 31, of said act." But when we come to look at the act itself, there is not a word that speaks of the repeal of the original act, or any section or part of it, or of that act being a substitution for it or any part of it, or any modification of it; nor is the original act mentioned in it. It commences in its first section as follows:

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“Section 1. A company is hereby incorporated, called ‘The Louisiana & Missouri River Railroad Company,’ the capital stock of which shall be ten millions of dollars,”—and continues through the whole thirty-four sections speaking of the manner of organization, the subscription to the stock, general management, and franchises of the corporation created by that act, as if no other corporation by that name had ever existed; stating in section 18 that “the company hereby incorporated shall commence the construction of the said road within ten years after the passage of this act,” and in section 20 undertaking to allow county courts of any county in which any part of the line of said road may be located to subscribe to its stock, without submission to the qualified voters.

As creating a corporation it is a nullity, the legislature being prohibited from passing any special charter. As an amendatory act of a corporation existing at the time of the adoption of the constitution, it must stand on the effect of the title alone. Nothing is better settled than that a title to an act is no part of the act itself. All the office it can perform is to indicate the sense in which the legislature used certain words or expressions contained in the act which are in themselves ambiguous. *Dwaris on Stat.* 265, *Potter's ed.*; *Sedgwick on Stat. and Cons. Law*, 50.

But to say that the title of an act is to repeal another act or parts of it and substitute that act in the stead of it, when the act itself not only does not manifest any such intention, but there is no word in it upon the subject, is to make it perform an office which no one has ever contended that it is capable of performing.

It follows as a necessary consequence that if that act is void, the Louisiana & Missouri River Railroad Company are not authorized to construct any railroad on the south side of the river, and of course no subscription to it can be valid.

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Neither does section 32 of Article IV. of the constitution, which provides that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title, but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed," in any way change or modify the law as it then stood, that the title is no part of the act. The evil that this section was intended to reach and cure, was the deception that was frequently practiced by means of a false title, or a title not stating the whole truth, both on the public and on the general assembly; on the public by lulling them to sleep from opposing an unjust or impolitic law; on the general assembly in the passage of laws by their title in profound ignorance that the law contained anything but what the title gave evidence of. That provision of the constitution simply says; that if by your title you have not properly pointed out to the public and the general assembly what the act is about, in so far as you have failed in that particular, your act is void. The provision itself makes a distinction between the *act* and its *title*. The decisions are that a title which fairly expresses the subject of the act is sufficient. The title to the act is no more operative or has any larger effect than before, except that, in order that the act itself should be valid, the title of the act must be exact as expressing its subject-matter and must not be misleading. When the constitution prescribes that the style of the laws of the state shall be: "Be it enacted by the general assembly of the state of Missouri, as follows," it does not state that what precedes that style is a law or part of a law, but that which follows it.

But in this particular case, to say that the title to this act of 1868 shall operate to do that which on looking at what follows the enacting clause does not purport to be done—to give it the effect of repealing an act, or

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part of it, and substituting another act, or part of an act, for it—when the act itself is not only entirely silent on the subject, but the words used are entirely inconsistent with it, as has been before shown, is a result little dreamed of by the convention.

But if the effect be granted to the title it does not help the matter; the result is the same, for if the subject embraced in the "*act is not expressed in the title,*" then as to so much as is not expressed the act is void. That is precisely the case here. Without going into a long comparison of the title and the act, it is sufficient to say, as to the amendment of another act, and of the four or five things in which it is said to be amended, called for by the title, that there is no mention made in the act itself of any previous act; no mention made of any amendment to it; no mention made of this act being any substitution for that; no mention made of any amendment in the four or five matters mentioned in the title; no repeal of the specified sections; but when we look at the act we find that it is an act granting a charter to certain persons to construct a railroad, with a capital of ten million dollars, happening to have the same name as that of a company chartered in 1859, but in no way connecting itself with that charter or with that company.

Upon the whole case, the judgment is affirmed.

WAGNER, J., dissented as to the right of the state to maintain the form of proceeding, and as to holding the act of 1868 void; but concurred in the remainder of the opinion that the original charter only authorized the company to construct the road to the Missouri river, and that the act of 1868 could not invest the county court of Saline county with power to subscribe the stock without being first authorized so to do by a vote of the people.

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BLISS, J., concurred.

Judgment affirmed.

The defendants moved for a rehearing.

Sharp and Broadhead, with whom was *Thomas J. C. Fagg*, on motion for rehearing.

1. The question of most importance, so far as the railroad company is concerned, is the validity of the act of 1868, as an amendment to the charter of the company passed in 1859. Upon this point the court, as constituted by the selection of a special judge, seems to be divided in such manner as to leave it in doubt as to what is really decided. The special judge holds the act of 1868 to be wholly illegal and void. Judge WAGNER dissents, and Judge BLISS expresses no opinion. It is certainly a grave question, both as it affects the county of Saline and the railroad corporation, leaving both in a state of uncertainty in reference to their respective rights and liabilities.

2. The power of the legislature to amend the charter of a railroad company, so as to extend the line of its road, and also to construct branches, is conceded by all the members of the court. Now as to the powers, rights, privileges, and franchises that will be carried by such amendment there is no expression of opinion except by the special judge, and it is submitted that upon the idea that the original charter prohibited the company from crossing the Missouri river, this is really the controlling point in importance in the whole case. It is believed that the best interests of the state at large, as well as the parties directly affected by the proceeding, will be directly subserved by the reargument and reconsideration of this question. It is claimed that the opinion of the special judge is in conflict with the decision of this court in *State ex rel. Circuit Attorney v.*

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3. The force and effect of the act of March 24, 1868, as a declaratory statute, was not presented to the court at all. The object of that statute was to render certain that which was not certain as to the western terminus of the road as fixed by the act of 1859. In other words, it was a legislative interpretation of the act of 1859 which did not conflict with any judicial construction of it nor did it affect any vested rights under it. It was not retrospective but operated entirely *in futuro*, and, therefore, it was competent for the legislature to pass it, and thereby fix the route of the road so as to authorize any county on the same side of the river to subscribe to the capital stock.

VORIS, J.—The motion in this case together with the proceedings in the cause have been fully considered.

The motion seems to be mainly predicated upon the disagreement of the judges of the court who heard the cause upon the validity of the act of 1868, as an amendment to the charter of the Louisiana & Missouri River Railroad Company, passed in 1859. In my view of this case, it is not material to the settlement of the main question involved therein, whether said act be valid or not, and this, I think, was the opinion of the judges who heard the cause; the judgment of the court would be just the same let this question be decided one way or the other. Therefore, I think that it would be unjust to compel the respondents in this case to reargue the cause in order to settle a question which can not affect the general result. It may be true that it is important that this question should be settled, and if we were sitting in this case to hear it upon the original trial in this court, we might deem it our duty to pass upon the question suggested; but in my opinion, it would be unjust to the opposite party under such cir-

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cumstances to compel it to rehear and reargue the cause.

ADAMS and WAGNER, JJ., absent.

Others concurred.

Motion denied.

STATE OF MISSOURI v. CALLAWAY COUNTY
COURT.

51 *Missouri*, 395.

Supreme Court of Missouri; January Term, 1873.

Municipal corporations. Parties to action to cancel illegal subscription. In an action for the cancellation of a subscription by a county to the stock of a railway company, and for the surrender and cancellation of bonds of the county issued in payment of such subscription, the railroad upon whose stock-books is the subscription, and the agent of the county who holds the bonds for negotiation, are proper parties.

Appeal to the supreme court of Missouri from the circuit court of Callaway county.

This was an action to restrain the issuing and negotiation of county bonds in payment of a subscription by the county to the stock of a railway company, and for the cancellation of the bonds and the subscription, and the annulment of orders of the county court imposing a tax for the payment of the same. The facts

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were similar to those in the preceding case, varying in some respects, as will appear from the statement, in the opinion, of the allegations of the petition. The defendants demurred to the petition, and upon the hearing the demurrer was sustained, and judgment rendered for the defendants. The plaintiff appealed.

Overall, Circuit Attorney, Adams & Guitar, and Edwards & Dunckan, for the appellants.

R. A. Campbell, Sharp & Brodhead, Ewing & Smith, and Hayden, Kouns, & Hockaday, for the respondents.

SHEPLEY, SP. J.—This was a proceeding in the nature of an injunction brought by the state, through the circuit attorney of the second judicial district, against the county court of Callaway county and the justices thereof, the Louisiana & Missouri Railroad Company, and Thomas L. Price, to restrain the issuing and negotiation of certain bonds of Callaway county, issued and to be issued in payment of a subscription to the capital stock of the railway company, made by the county, which subscription is alleged to be illegal and void.

The petition, after alleging the incorporation of the railroad company, in 1859, and stating the line of the railroad, as authorized to be constructed by that charter, goes on to state the passage by the legislature of the act of March 24, 1868, alleged to be an act amendatory of the charter (the force and effect of which we have considered in the case of the State v. Saline County, decided at the present term); that the amendment was duly accepted by the railroad company, “and became, and is to all intents, the charter of said company;” that by the amendatory act the railroad company is invested with the power to locate and con-

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struct a branch road, to be known as the South Branch, which was a new and independent enterprise, and that by that act subscriptions to the branch and main lines were to be kept separate, and that subscriptions to one can not be used for the other; that the main line, as located, does not touch Callaway county, but the South Branch runs through it. That in August, 1868, the county court of Callaway county, without submitting the matter to the qualified voters of the county, made a subscription of five hundred thousand dollars to the "South Branch of the Louisiana & Missouri River Railroad," which was entered on the subscription book of the branch road. That the subscription so made was void. That in 1868 and 1869, the county court ordered to be executed, and did execute and place in the hands of defendant, Price, for negotiation, two hundred thousand dollars of the bonds, which were then in his hands, and he received them knowing that they were void. That in 1869 the county court levied a tax in the payment of these alleged bonds and the interest thereon, and that such taxes were then in the hands of the collector of the county for collection. That the county court will, if suffered to go on, by this unlawful taxation, appropriate to the use of the railroad company in payment of said illegal bonds the greater part of the taxable property of the county, and that the state will be greatly hindered and prevented from collecting its revenues; that irreparable loss and damage will be inflicted upon the tax-payers of the county and state; and prays that the circuit court, in the exercise of its superintending control over the county court, restrain that court and its justices in their illegal acts; that the bonds issued be delivered up and canceled; that the orders of the county court imposing a tax be annulled, and the subscription to the South Branch be canceled, and for other relief

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Copies of the several orders of the county court are made exhibits to and filed with the petition.

To the petition the defendants demurred, upon the ground that the suit was improperly brought in the name of the state; that Price and the justices of the county court were not necessary or proper parties; that the county court had a perfect right to do what they did; that the action of the county court was ministerial, and the circuit court had no jurisdiction of the case either by prohibition or injunction; that if illegal neither the state nor any tax-payer could be injured; that by the showing of the petition the injuries, if any, are not irreparable, and there is an adequate remedy at law; that the allegation that by these acts the revenue of the state is endangered, is absurd on its face and impossible.

Upon the hearing the demurrer was sustained, and judgment was given for the defendants.

As will be seen, the subscription alleged to be invalid is made to the stock of the same railroad company, the charter of which and the alleged amendment thereto came up and was examined by the court in the case of the State of Missouri *ex rel.* Circuit Attorney v. Saline County and others, decided at the present term. *Ante*, 149. Saline county is on the south side of the Missouri river, and the route of the railroad could not possibly pass through that county, as fixed by the original charter. Callaway county is on the north side of the river, and may fairly be assumed to be one of the counties through which the route of the railroad, as designated in the charter of 1859, might run.

The change of the route which was supposed to be effected by the amended act, was where in the twenty-first section of that act it gave said company the power to construct a road from Louisiana, through or near Bowling Green, to such point on the north or south bank of the Missouri river as the directors might

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select; and by the twenty-second section, to construct such branch, to be called the South Branch, from the main line at a point not further east than Bowling Green, to any point on the Missouri river between St. Aubert, in Osage county, and the city of Boonville, in Cooper county.

It is stated in the petition that the main line, as fixed by the act of 1868, does not run through Callaway county, but that what is called the South Branch as fixed does, and that the subscription complained of was made to the South Branch.

Upon reference to the decision in the case of the State v. Saline County, before referred to, it will be seen that it was there decided that the alleged amendatory act of 1868 was illegal and void, and, therefore, that the petition, in undertaking to state that that act is and was the charter of the company, is entirely in error.

The petition (the truth of which, as the judgment was on the demurrer, must be assumed) distinctly states that the subscription was to the South Branch of the Missouri & Mississippi Railroad, and was made in August, 1868.

Apparently there is a violation of law in making the subscription. It is illegal as being made upon a branch road constructed and marked under the provisions of an act which we hold to be void, and we are not allowed, in deciding this case, to look into what are filed as exhibits with the petition, but are confined to the case as presented in the petition itself. As the case now stands, having in the case of the State v. Saline County affirmed the jurisdiction, it will have to be reversed; and as we have decided to remand it, it may be proper to say that if the exhibits show the true facts of the case, the county of Callaway had, in January, 1867, and before this supposed amendatory act was passed, ordered a subscription to be made to the stock

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of the company, and by their proceedings of June 11, 1868, it would appear that the subscription was made to the corporation, and for the construction of the line as it originally stood, but on that day the county court, approving the acceptance of the amendment by the company, ordered that the commissioners "transfer the stock taken by said commissioners" in the "capital stock of the company to the branch books of said company."

If there had been no change in the subscription, and no attempted amendment, and the company had constructed their line to the Missouri river substantially as they have done, it may be that the subscription would have been perfectly legal. The facts are not before us so as to form any opinion upon the question or upon the effect of the subsequent action of the county court or the railroad.

It is objected that the railroad company and Price are not proper parties to the proceedings.

The petition asks that the subscription to the stock-books be canceled, and the bonds be surrendered and canceled. The subscription can not be canceled, as the stock-books are in the hands of the company, except by making the railroad company a party to the proceeding.

It might be that the practical results would be the same if in a suit against the county alone this transaction was declared to be illegal, but as the prayer is that the subscription may be canceled, we can not say that the railroad company is an unnecessary party. Nor can Price be considered an unnecessary party, as it is averred that the bonds alleged to be illegal are placed by the county court in his hands for negotiation as the agent of the county.

The case is reversed and remanded.

WAGNER, J., dissented on the question of jurisdic-

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tion, and did not concur in holding the act of 1868 void.

BLISS, J., concurred in the result.

Judgment reversed.

STATE OF MISSOURI v. SULLIVAN COUNTY
COURT.

51 *Missouri*, 522.

Supreme Court of Missouri; February Term, 1873.

Municipal corporations. Subscriptions to stock of railway companies.

Where the charter of a railway company, granted by the state legislature, gives authority to the counties through which the route of the railway passes, and those adjoining and near thereto, to subscribe for stock of the railway company without first submitting the matter to a vote of the people of the county, the power of such counties to do so is not affected by a constitutional provision, subsequently adopted, prohibiting any county from becoming a stockholder in or loaning its credit to any company, &c. without the assent, by vote, of two-thirds of its people.

Appeal to the supreme court of Missouri from the circuit court of Sullivan county.

This was an application for a mandamus to compel a county court to issue bonds of the county for the purpose of paying a subscription by the county to the capital stock of a railway company. The facts appear in the opinion. The return to the alternative writ alleged that the subscription was invalid. To this return a replication was filed in denial. Upon the hearing, a

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peremptory mandamus against the county court was awarded. They appealed.

A. H. Vories, Vineyard, Young, M. Oliver, and others, for the appellant.

G. D. Burgess & A. W. Mullins, for the respondents.

WAGNER, J.—This was a proceeding in the circuit court of Sullivan county, by mandamus, to compel the county court of that county to issue bonds to the amount of two hundred thousand dollars, in compliance with an order of that court, made on May 1, 1871, subscribing said amount for and in behalf of said county to the capital stock of the St. Joseph & Iowa Railroad Company.

The alternative writ sets out the corporate character of the relator, and states in substance that at a meeting of the board of directors, held at St. Joseph, in March, 1871, the company projected and undertook the construction of a branch railroad, to be known and designated as the Central North Missouri branch of the St. Joseph & Iowa Railroad; said branch road to be built from a point of intersection with the main line of the St. Joseph & Iowa Railroad, at or near the town of Unionville, in the county of Putnam, in this state, and running thence southwesterly, through the counties of Putnam, Sullivan, &c.

It is alleged that the county court of Sullivan county, at a regular term held on May 1, 1871, acting under and in pursuance of law, and by the authority of the provisions contained in the charter of the relator, made an order of record subscribing for and in behalf of said county the sum of two hundred thousand dollars to the capital stock of the relator, for the said branch as above designated. The order reads as follows: "It is ordered by the court here that the county

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of Sullivan subscribe, and the court does hereby for and in behalf of said county subscribe two hundred thousand dollars to the capital stock of the St. Joseph & Iowa Railroad Company, in the name and for the use of the Central North Missouri branch of the St. Joseph & Iowa Railroad Company, to aid in the construction of said branch railroad through the county of Sullivan, and that the subscription hereby made shall be paid by said county by issuing and delivering, upon the terms and conditions hereinafter specified, the bonds of said county, made by its county court, and duly signed by the presiding justice of said court, and attested by the clerk thereof, with the seal of said court affixed; which said bonds are to be of the denomination of one thousand dollars, and to become due and payable twenty years after the date thereof, bearing interest at the rate of seven per cent. per annum from the date, payable semi-annually, with coupons for interest to be attached or annexed to said bonds; said bonds when issued are to be placed in the hands of Warren McCullough, as trustee for said county and the Burlington & Southwestern Railway Company; which said bonds are to be delivered to the Burlington & Southwestern Railway Company, subject to the conditions and in the manner following: That the work of constructing said branch railroad in the county of Sullivan shall be begun by said Burlington & Southwestern Railway Company within six months from May 1, 1871, and the construction thereof completed, with the rolling stock thereon, through said county, within twenty-one months from the time of commencing the work; and that as soon as the work of grading on said road shall be commenced in said county, then the bonds in payment of said subscription are to be issued and placed in the hands of said trustee; and as soon as one-fourth the cost of said work in said county is completed, as shown by the

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report and certificate of the engineer in charge of the work, and said work paid for by said company, then the said county through said trustee, shall deliver to said Burlington & Southwestern Railway Company forty thousand dollars of said bonds; and when one-half of said work is completed and paid for by said Burlington & Southwestern Railway Company, then the county is in like manner to deliver forty thousand dollars more of said bonds, and so on until the road is completed through the county and paid for by said company, with the iron and rolling stock thereon, when the last installment of said two hundred thousand dollars in bonds is to be delivered to said company. Provided, however, that the said bonds are not to be delivered to said company with over-due or half-matured coupons attached thereto; but such coupons are to be detached from said bonds and retained by said trustee for cancellation.

“And it is further hereby provided that said subscription is made upon condition that said railroad shall be permanently located and constructed so as to pass within a distance not exceeding eight hundred yards from the court-house in the town of Milan, in said county; and that there shall be within the distance above named from said court-house a general freight and passenger depot, built and maintained by said company as soon as said road is ironed and operated through said county; and that in the event the said Burlington & Southwestern Railway Company fail to commence said work and prosecute the same to completion within the time herein limited, then this court shall be authorized to rescind this order and make the same null and void.”

It is also alleged that in pursuance of the above order, the county court, on May 1, 1871, entered the subscription of Sullivan county on the subscription book of the said company, and that on the same day

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the said St. Joseph & Iowa Railroad Company accepted the said subscription on the terms and conditions set forth in the above recited order; that immediately after the making and acceptance of said subscription, and prior to September 4, 1871, and upon the faith thereof, the said Burlington & Southwestern Railway Company did commence the work of surveying, locating, grading, and constructing the said road in the county of Sullivan, and have worked continually at the same, and now have a large force employed in locating, grading, and constructing the road in said county; and that the relator and the said railroad company have, upon the faith of said subscription, laid out and expended large sums of money in the location and construction of the road in Sullivan county, and have made divers contracts, and incurred great liabilities for the construction of the road in said county, in consequence of the subscription, and that the contracts were made and the liabilities incurred prior to September 4, 1871. That on October 4, 1871, the relator demanded of the county court that it should issue the bonds in pursuance of its order, and place them in the hands of Warren McCullough, the trustee named in the subscription; but the court refused and still refuses to issue the bonds, for the alleged reason that the order of subscription has become null and void, because the court, at the August adjourned term, on September 4, 1871, rescinded and revoked said order.

The return of the respondents to the writ admitted making the order of subscription, and that said subscription was duly entered upon the books of the company; but averred that the order was not made in pursuance of law, or by virtue of any authority contained in the charter of the company; that said Central North Missouri branch of the railroad company was not organized or entitled to receive subscrip-

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tions to its capital stock until March 25, 1871, and that the order and subscription were made on May 1, 1871, without the direction of two-thirds of the voters of the county ; and that under the constitution of the state no subscription was valid unless two-thirds of the qualified voters assented thereto.

For further answer respondent denied all knowledge or information as to whether the construction of the road had been commenced ; alleged that the order authorizing the subscription had been rescinded ; that a prior subscription had been made to the capital stock of the Quincy, Missouri, & Pacific Railroad, and that the aggregate subscription to both roads exceeded ten per cent. of the assessed taxable property in the county, and the last subscription was, therefore, void.

To this return a replication was filed, which constitutes a denial of the main issues tendered.

Upon a hearing of the cause the court found for the plaintiff, and awarded a peremptory writ of mandamus. The bonds were issued and placed in the hands of the trustee, but subsequently an appeal was granted by a former judge of this court in vacation.

No exceptions were taken at the trial or saved to the rulings of the court, and we can, therefore, only examine such errors as appear upon the face of the record.

It is contended in the argument that facts are not stated showing such a compliance with the terms of the order and subscription in the matter of location as would entitle the relator to the bonds, in this ; that it is not alleged that the road has been located within eight hundred yards of the court-house, in the town of Milan. But the relator is not asking for the absolute delivery of the bonds to himself. It only demands that they shall be issued and placed in the hands of the trustee, to be used according to the terms agreed upon between the parties and pursuant to the provisions of

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the subscription. The condition is that as soon as the work of grading on the road shall be commenced in the county, then the bonds in payment of said subscription are to be issued and placed in the hands of the trustee, to be paid out as thereafter provided, as the work progressed. There is an express averment of the commencement of the work according to these terms, and the court must necessarily have found a compliance on the part of the relator when it ordered the writ. The presumption is in favor of its decision. Besides, the rule, as settled under our statute of amendments and jeofails is that, although a statement may be defective, yet, if it appears after verdict that the verdict could not have been given or the judgment rendered, without proof of the matter omitted to be stated, the defect will be cured by the statute.

The point insisted upon that the subscription made the amount more than ten per cent. of the assessed value of the property of the county, was a question of fact to be determined by the court below; and as the question is not in any manner saved, we can not review it.

It was incompetent for the court to set aside or rescind its order made at a previous term. A final order is in the nature of a judgment, and can not be set aside at a subsequent term on the ground of error. *Peake v. Reed*, 14 *Mo.* 79.

But the real question in the case is, whether the relator's charter authorized it to establish branches and receive county subscriptions without the counties subscribing being empowered thereto by a vote of the people.

The St. Joseph & Iowa Railroad Company was chartered by an act approved January 22, 1857. By section 3 of the act it is provided that "said company shall have full power to survey, mark, locate, and construct a railroad from the city of St. Joseph, in the

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county of Buchanan, to such point on the boundary line of this state as they may select, and may extend the same to such point or points in the state of Iowa as they may deem proper, and shall in all things be subject to the same restrictions, and be entitled to all the rights, privileges, and immunities which were granted to the Hannibal & St. Joseph Railroad Company by an act entitled 'An act to incorporate the Hannibal & St. Joseph Railroad Company,' passed at the session of the general assembly and approved February 16, 1847, and also by the amendments to the charter of the said Hannibal & St. Joseph Railroad Company, passed at the session of the general assembly, and approved February 23, 1853, and February 24, 1853, and March 3, 1855, so far as the same are applicable to the company hereby created (and not inconsistent with the powers hereby conferred), as fully and completely as if the same were herein re-enacted. '

Section 6 declares that "it shall be lawful for the county court of any county in which any part of the route of said road may be, or for the county court of any county adjoining or near the same, to subscribe to the stock of said company."

The act to incorporate the Hannibal & St. Joseph Railroad Company provides as follows: "That it shall in all things be subjected to the same restrictions, and entitled to all the privileges, rights, and immunities which were granted to the Louisiana & Columbia Railway Company, by an act entitled 'An act to incorporate the Louisiana & Columbia Railroad Company, passed at the session of the general assembly, 1836 and 1837, and approved January 27, 1837,' so far as the same are applicable to the company hereby created, as fully and completely as if the same were herein re-enacted."

The act chartering the Louisiana and Columbia

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Railroad Company, among other powers delegated to the corporation, says: "They shall have power to extend branches from the point of commencement in said town of Louisiana to any other part of said town; also to extend a branch or branches of said road into or through the town of Clinton in the same county. They also have full power and authority to make any other branches along said road, or at the termination thereof, as they may deem necessary or the public convenience require."

It will thus be perceived that the relator's charter, adopted by the legislature, gave the counties through which its route passed, and those adjoining and near thereto, full authority to subscribe stock without first submitting the matter to a vote of the people. It also gave the company full power to make such branches as it might deem necessary or the public convenience might require. It has always been held that the provision of the constitution, Art. XI., section 14, was a limitation upon the future power of the legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the constitution was adopted.

Power conferred on counties to take and subscribe stock without a submission to a vote of the people, before the constitution went into operation, remained unaffected by that instrument.

But it is contended that the case is governed by the decision in the State v. Saline County, *ante*, 149. The cases are not parallel. In that case the charter of the railroad provided for building a road to the Missouri river, and authorized the counties through which the route ran to take and subscribe stock without any vote. This was before our present constitution was adopted, and no question was made about the power of the counties along the original line taking stock independent and regardless of any vote. But the

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legislature, by an enactment subsequent to the constitution's taking effect, amended the charter and extended the road into other counties where no such authority was given, and we held that those last counties could not subscribe for stock without a vote of the people authorizing them to do so, because that power was not conferred upon them prior to the adoption of the constitution.

But the case here is entirely different. There has been no amendment of the relator's charter. The power was conferred previous to the adoption of the constitution, and that is the only power sought to be exercised.

I am of the opinion that the judgment should be affirmed.

VORIES, J., did not sit.

Others concurred.

Judgment affirmed.

NEWMAYER v. THE MISSOURI & MISSISSIPPI
RAILROAD COMPANY.

52 *Missouri*, 81.

Supreme Court of Missouri; February Term, 1873.

Municipal corporations. Subscriptions to stock of railroad companies.

Proceedings to set aside an order of a county court making a subscription to the stock of a railroad company, and to have the same declared null and void, and the bonds of the county issued to pay the subscription delivered up and canceled, may be maintained by any tax-payers on behalf of themselves and all other citizens and

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tax-payers similarly interested, upon sufficient grounds,—such as fraud,—if such acts will result in increased taxation. And the state is not a necessary party to such a proceeding.

Appeal to the supreme court of Missouri from the circuit court for Macon county.

This was a suit to set aside an order of a county court making a subscription to the stock of a railroad company, and to declare the subscription void, and cancel the bonds of the county issued to pay the same. The grounds set forth in the petition appear from the opinion. The defendants demurred to the petition. The demurrer was sustained, and judgment rendered for the defendants. The plaintiffs appealed.

James Carr, for the appellants.

R. T. Prewitt, Williams, Jones & Eberman, and *Chandler & Sherman*, for the respondents.

EWING, J.—This was a petition in the nature of a bill of equity filed by the plaintiffs on behalf of themselves and all other citizens and tax-payers who are similarly interested with themselves to set aside an order of the county court of Macon county making a subscription of one hundred and seventy-five thousand dollars to the capital stock of the Missouri & Mississippi Railroad Company, and to have the same declared null and void, and to have the bonds issued to pay said subscription delivered up and canceled. The bill alleges that plaintiffs were and are owners of a large amount of real estate and personal property situated in said county, and are tax-payers on the same; that in 1867 the county court of Macon county subscribed one hundred and seventy-five thousand dollars to the capital stock of said railroad company without the assent of two-thirds of the qualified voters of said county, no election, regular or special, having

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been held for the purpose of obtaining said assent; that bonds of said county have issued to the amount of said stock, &c.; that in order to raise more money for said road, the further sum of one hundred and seventy-five thousand dollars was subscribed to the capital stock in 1870. That said last subscription was the result of a corrupt and fraudulent combination and arrangement between the railroad company and the county court, whereby the judges of said court were to derive large pecuniary gains and advantages; that bonds were issued by said court in payment of said subscription and placed in the hands of defendants, Bartholow, Lewis & Co., bankers, for the purpose of having them negotiated to innocent purchasers for value without notice of the fraud by which said railroad company had procured them. The bill further alleges that the act authorizing said subscription is unconstitutional and void; that said subscription was made without authority of law, by collusion and in confederation with said railroad company and in fraud of the rights of the plaintiffs and other citizens and taxpayers of said county, for private advantages and gain, and to subserve the individual purposes and ends of said justices of the county court and other parties connected with them.

Defendants demurred to the petition on these grounds:

That the petition does not state facts sufficient to constitute a cause of action. There is a defect of parties plaintiff. There is a defect of parties defendant. Because plaintiffs do not show such irreparable injury to themselves as to authorize the interposition of a court of equity. The court sustained the demurrer, and, the plaintiffs declining to file an amended petition, final judgment was rendered on said demurrer. The cause is here by appeal.

It seems not to be seriously questioned that upon

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the facts stated in the petition, which are of course admitted by the demurrer, the plaintiffs are entitled to the relief prayed for if they can maintain the action; and the only remaining question that we deem it proper to consider is, whether the plaintiffs as *tax-payers* of Macon county have stated a title for the relief which they claim against the defendants; in other words, whether as such tax-payers, they have such an interest in the subject-matter of the suit as entitles them to maintain this action. I am not aware that this question has ever been passed upon by this court. In the case of Hooper v. Ely, 46 Mo. 505, the plaintiff as a *tax-payer* obtained an injunction against the treasurer to restrain him from paying a certain county warrant upon the ground that it was issued without authority of law, and also asked for an order upon the defendant, the holder, to bring it into court to be canceled. The only interest the plaintiff had in the subject-matter of the suit was that of a *tax-payer* of the county, and his right to maintain it was unquestioned.

The only other case similar to the one at bar was that of Steines v. Franklin County, 48 Mo. 167, which was a petition in the nature of a bill in equity brought by the plaintiffs as citizens and tax-payers of Franklin county, asking for a decree declaring a contract and certain orders of the county court of said county void, and requiring a cancellation and delivery of bonds issued under said contract and for an injunction restraining their payment, sale, or transfer, and restraining the assessment, levy, or collection of a tax for the purpose of their payment. No point was made as to the right of the plaintiffs as tax-payers to maintain the action.

The grounds upon which such suits by tax-payers have been held unmaintainable are, that it requires some individual interest distinct from that which belongs to every inhabitant of the town or county to give

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the party complaining a standing in court, where it is an alleged delinquency in the administration of public affairs which is called in question ; and that the ownership of taxable property is not such a peculiarity as to take the case out of the rule ; and that the only remedies against an abuse of administrative power tending to taxation is furnished by the elective franchise or a proceeding on behalf of the state, or, in the case of an act without jurisdiction, in treating the attempt to enforce the illegal tax as an act of trespass. DENIO, J., in *Roosevelt v. Draper*, 23 *N. Y.* 318 ; see also *Doolittle v. Supervisors, &c.*, 18 *Id.* 155. The case of *Roosevelt v. Draper*, *supra*, decided in 1861, is the latest decision on the subject in the court of appeals, to which our attention has been called. We have been referred, however, to a number of earlier decisions in the courts of that state which hold a contrary doctrine,—recognizing the right to maintain such suits ; and they have been followed in several of the other states.

The first of these that will be noticed is the case of *Christopher v. Mayor*, 13 *Barb. (N. Y.)* 567, which was a proceeding by injunction to restrain defendants from acting under a resolution of the board of aldermen relative to the rebuilding of a market. *Held*, that plaintiffs as tax-payers had such an interest as entitled them to the relief they asked ; that as the necessary effect of the act complained of would be to impose a burden upon their real estate, they had an interest as certain and direct as that of a stockholder in a moneyed or other corporation. So in the case of *Milhau v. Sharp*, 15 *Barb. (N. Y.)* 195, which was an application for an injunction to restrain defendants from constructing a railway in a certain street of the city of New York, the court say, plaintiffs being tax-payers to a large amount, have such an interest in preventing the grant in question from being carried into effect, that they had a right to institute the suit in their own names.

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To the same effect is *Stuyvesant v. Pearsall*, 15 *Barb.* (N. Y.) 244, in which it is held that the court on the complaint of a tax-payer may restrain parties from constructing railroads in the city, the granting of the right to construct which involved a breach of trust on the part of the corporation. In *De Baun v. Mayor*, 16 *Barb.* (N. Y.) 392, it was held that a person owning real estate in the city of New York and paying taxes on it, might prosecute an action against the corporation, on behalf of himself and other tax-paying citizens, to enjoin them from expending the money to be raised by taxation in repairing or paving a street in a manner contrary to an express law, and tending to add to the taxes of the inhabitants. The same question came before the court again in the case of *Wood v. Draper*, 24 *Barb.* (N. Y.) 187—decided in 1857—and after a thorough review of the previous decisions in that court on the subject, the court say: “It must be regarded as the settled law of this court that it will grant its aid to restrain by injunction the imposition of any tax or burden on the tax-payers of this city contrary to law, on a complaint filed by any tax-payer on his own behalf as well as on behalf of others similarly interested.” The correctness of these decisions has been questioned in some later decisions in that state, which have been referred to. In *Sharpless v. Mayor of Philadelphia*, 21 *Pa. St.* 147, the plaintiffs, as property owners and tax-payers of the city, filed their bill to enjoin the mayor from carrying into effect certain ordinances of the city which authorized subscriptions by the city to certain railroads. The right of the complainants to maintain the suit was unquestioned. In *Mercer County v. Pittsburg, &c. R. R. Co.*, 27 *Pa. St.* 404, it is said, that as every taxable inhabitant is interested in all measures which increase the taxes, he may apply for an injunction against abuses of that character. In a more recent case in that state, decided

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in 1868, *Page v. Allen*, 58 *Pa. St.* 338, a bill in equity was filed by plaintiffs, residents and tax-payers of Philadelphia, against the aldermen of the city, to restrain them from exercising certain powers which it was alleged they claimed by virtue of a certain act of assembly known as the registry act, and charging that a large sum of money would be required from the city treasury to put the act into operation, which as tax-payers they were interested to prevent, and which would be wholly misapplied. The act being unconstitutional, the court say, the right of the plaintiffs to interfere on these grounds was not disputed, neither could it have been at any time since the decision in *Sharpless v. Mayor*, 21 *Pa. St.* 147, and *Moers v. Reading*, *Id.* 18. In both it was conceded that the interest of a tax-payer, where money was to be raised by taxation, or expended from the treasury, was sufficient to entitle him to proceed in equity to test the validity of the law which proposed the assessment or expenditure. To the same effect is *Mott v. Pennsylvania R. R. Co.*, 30 *Pa. St.* 9.

The next case to which we refer, was decided by the court of appeals of Maryland, in 1869. *Mayor, &c. of Baltimore v. Gill*, 31 *Md.* 375-394-5. This was a proceeding to restrain by injunction, appellants, the mayor, *et al.*, from carrying out the provisions of an ordinance authorizing the borrowing of money to build certain railroads, which was claimed to be unconstitutional. The complainants were tax-payers on real and personal property situated in Baltimore, and they sued in behalf of themselves and others similarly interested. It was maintained that the complainants had no standing in court, and were not entitled to ask the interposition of a court of equity to restrain by injunction the execution of the ordinance, even though it may have been passed in violation of the constitution. It was further maintained that the wrong complained of was

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of a public nature, affecting the whole public, in which the attorney-general, as the representative of the state, was a necessary party. It was held that the interest of the plaintiffs as tax-payers was sufficient to entitle them to maintain the action, and that the attorney-general was not a necessary party. BARTOL, Ch. J., in delivering the opinion of the court, says: the case is to be distinguished from cases of public wrongs, in which the general public are alike concerned; that the complainants are tax-payers of the city, and with others similarly situated constitute a class specially damaged by the alleged unlawful act, in the increase of the burden of taxation upon their property situated in the city. They have, therefore, a special interest in the subject-matter of the suit, distinct from that of the general public. The court cites the cases of *New London v. Brainard*, 22 Ct. 552; *Webster v. Harwinton*, 32 Id. 131; and *Merrill v. Plainfield*, 45 N. H. 126, as distinctly affirming the right of tax-payers to file a petition of this kind, but we have not access to the reports at present. To the same effect are the decisions in Iowa; see *McMillan v. Lee County*, 3 Iowa, 311; *Collins v. Ripley*, 8 Id. 129.

The question was before the supreme court of Illinois, in the case of *Supervisors, &c. v. Keady*, 34 Ill., 293, but its consideration was waived by the plaintiffs in error, and the court expressed no opinion upon it, remarking that the question was undetermined in that state.

I have examined the cases cited in support of the other side of the question, or such of them as we have had access to; and upon a careful consideration of the subject, I am of opinion that the decisions which affirm the right of plaintiffs (or those standing in the same relation to such controversies) to maintain the action, rest upon a more solid foundation of principle and reason than those holding the contrary doctrine. And

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they are commended to our approval as furnishing the only adequate remedy to the injured party for wrongs resulting from unauthorized or illegal acts like those complained of. The injury charged as the result of the acts complained of is a private injury in which the tax-payers of the county of Macon are the individual sufferers, rather than the public. The people out of the county bear no part of the burden; nor do the people within the county, except the tax-payers, bear any part of it. It is therefore an injury peculiar to one class of persons, namely, the tax-payers of the county of Macon.

I am of opinion that the action is well brought in the name of the plaintiffs as tax-payers, on behalf of themselves and all others who are similarly interested, and that the state is not a necessary party to the suit.

The judgment of the circuit court is reversed, and the cause remanded.

All concur.

Judgment reversed.

THE WILMINGTON & WELDON RAILROAD
COMPANY v. REID.

18 Wallace, 264.

*Supreme Court of the United States; December
Term, 1871.*

Taxes. Exemption by provisions of charter. Where the charter of a railroad company exempts from taxation the property of the company and the shares therein, a subsequent act imposing a tax upon the franchise, rolling stock, and real property of the com-

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pany, is void, as it impairs the obligation of the contract in the charter.

In the application of such an exemption, the corporate franchise can not be distinguished from other property of the company, and is equally within the protection of the contract.

Error from the supreme court of the United States to the supreme court of North Carolina.

This was a suit for an injunction to restrain the defendant, as sheriff, from a threatened seizure of the plaintiff's property for non-payment of a tax.

The plaintiff was incorporated by the legislature of North Carolina, the act of incorporation providing that "the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever." Under a subsequent act, a tax was assessed upon the franchise and rolling stock of the company, and certain real estate owned by it, necessary to its business. The company refused to pay the tax, and made this application for an injunction against the collection of it, alleging that the act was void as impairing the obligation of a contract. The court held the act valid, and denied the injunction. To review this judgment the company prosecuted a writ of error from the supreme court of the United States.

Carlisle, McPherson, and B. F. Moore, for the plaintiff in error.

W. H. Battle, for the defendant in error.

DAVIS, J.—It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state can not violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true

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that when a corporation claims an exemption from taxation, it must show that the power to tax has been clearly relinquished by the state, and if there be a reasonable doubt about this having been done, that doubt must be solved in favor of the state. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests.

It may be conceded that it were better for the interest of the state that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered.

In the nature of things the necessities of the government can not always be foreseen, and in the changes of time the ability to raise revenue from every species of property may be of vital importance to the state; but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power.

There is no difficulty whatever in this case. The general assembly of North Carolina told the Wilmington & Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvement for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise and rolling

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stock of the company, and upon lots of land appurtenant to and forming part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation can not perform the functions for which it was created without owning rolling stock, and a limited quantity of real estate, and that these are embraced in the general term property. Property is a word of large import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract. But no such case has arisen, and we are only called upon to decide upon the case made by the record, which shows plainly enough that the company has not undertaken to abuse the favor of the legislature.

It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation,—which in its application to a railroad is the privilege of running it and taking fare and freight,—is property, and of the most valuable kind, as it can not be taken for public use even without compensation. *Redfield on Railways*, 129, § 70. It is true it is not the same kind of property as the rolling stock, road bed, and depot grounds, but it is equally with them covered by the general term “the property of the company,” and, therefore, equally within the protection of the charter.

It is needless to argue the point further. It is clear

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that the legislation in controversy did impair the obligation of the contract which the general assembly of North Carolina made with the plaintiff in error, and it follows that the judgment of the supreme court must be reversed.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

THE RALEIGH & GASTON RAILROAD
COMPANY v. REID.

18 *Wallace*, 269.

Supreme Court of the United States ; December Term, 1871.

Taxes. Exemption by provisions of charter. Where the charter of a railroad company exempts from taxation all the property of the company for a certain term of years, and afterwards until the annual profits exceed a certain percentage, subsequent legislation imposing a tax, although the annual profits have not reached the percentage specified, is void, as impairing the obligation of a contract.

Error from the supreme court of the United States to the supreme court of North Carolina.

This was a suit of the same nature as the preceding case, brought upon a similar state of facts, except that in this case the exemption from taxation of the property of the railroad company was limited by its charter to a term of fifteen years, and until the annual profits should exceed eight per cent., when a tax upon the individual shares of stockholders, not exceeding twenty-

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five cents a share per annum, might be imposed. It was shown that the annual profits had never reached eight per cent.

Carlisle, McPherson, and B. F. Moore, for the plaintiff in error.

W. H. Battle, for the defendant in error.

DAVIS, J.—The only way in which the property of this company could be reached for taxation at all, was after the limitation of the fifteen years had expired. The legislature was then at liberty to tax the individual shares of the stockholders, whenever their annual profits exceeded eight per cent. When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. It was the manifest object of the legislation which incorporated this company, to invite the investment of capital in the enterprise of building this road; and no means better adapted for the purpose could have been devised, short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the government, and even after it became remunerative, its contribution was fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock. The impolicy of this legislation is apparent, but there is no relief to the state, for the rights secured by the contract are protected from invasion by the constitution of the United States.

As the pleadings show that the annual profits on the shares of stock have never reached eight per cent., it follows that they were not subject to any public charge or tax.

Judgment reversed, and the cause remanded for further proceedings in conformity with this opinion.

Tomlinson v. Jessup.

TOMLINSON v. JESSUP.

15 Wallace, 454.

Supreme Court of the United States ; December Term, 1872.

Taxes. Exemption by provisions of charter. At the time of the incorporation of a railroad company by the state of South Carolina, a general law of that state was in force, providing that any corporate charter subsequently granted, or any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless excepted by its express terms. A subsequent amendment to the charter provided that the stock of the company, and its real estate connected with or subservient to the works authorized by its charter, should be exempt from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law referred to. Several years later a new state constitution was adopted, which subjected to taxation the property of all corporations then existing or thereafter created. Subsequent legislation provided for the taxation of the property of railroad companies; and under it the property of the railroad company in question was taxed. *Held*, that the taxation was legal and constitutional. The power reserved to the state by the general law authorized any change in the contract created by the charter between the corporators and the state, as it originally existed, or as subsequently modified, or its entire revocation.

Immunity from taxation, constituting a part of the contract between the government and the corporators or stockholders, was, by the reservation of power contained in such general law, subject to be revoked equally with any other provision of the charter, whenever the legislature might deem it expedient. The reservation affected the entire relation between the state and the corporation, and placed under legislative control all rights, privileges, and immunities derived by its charter directly from the state.

Appeal to the supreme court of the United States from the circuit court for the district of South Carolina.

Tomlinson v. Jessup.

This was a suit in equity by a stockholder of the Northeastern Railroad Company, a corporation created in 1851 by the state of South Carolina, to enjoin the defendants, as officers of the state, from levying a tax on the property of the company.

At the time the charter of the company was granted, an act of the general assembly, passed in 1841, was in force, enacting as follows:

“It shall become part of the charter of every corporation, which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority.” 11 *Stat. at Large*, 168, § 41.

The act of incorporation did not except the charter of the company from the operation of this section. The company received extensions of their powers and privileges at various times subsequently, but in no case did the amendatory acts except the company from the operation of that section. 12 *Stat. at Large*, 176, 208-9, and 370.

By an act passed December 19, 1855, entitled “An act to amend the charter of the Northeastern Railroad Company, and for other purposes,” it was enacted as follows:

“That the stock of the said company, and the real estate that it now owns or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of the said company.” 12 *Stat. at Large*, 407.

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This latter act did not except in terms the charter of the company from the provisions of the act of 1841, above recited.

The present constitution of South Carolina was adopted in 1868, and article 9, section 1, is as follows :

“The general assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, except mines and mining claims, the proceeds of which alone shall be taxed ; and also exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes.”

Article 12, section 2, is as follows :

“The property of corporations now existing or hereafter created, shall be subject to taxation, except in cases otherwise provided for in this constitution.”

On September 15, 1868, the general assembly passed an act entitled “An act providing for the assessment and taxation of property,” the first section of which declares—

“That all real and personal property in this state, and personal property of residents of the state, which may be kept or used temporarily out of this state, with the intention of bringing the same into the state, or which has been sent out of the state for sale and not yet sold ; all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, of parties resident in this state, shall be subject to taxation.” 14 *Stat. at Large*, 27.

Subsequent acts provided specially for the taxation of the property of railroad companies, under which the officers of the state were proceeding to assess and tax the property of the Northeastern Railroad Company, when the present bill was filed.

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The court below granted a temporary injunction, which was afterwards made final; and from the final injunction the defendants appealed to the supreme court.

D. T. Corbin and *D. H. Chamberlain*, for the appellants.

T. G. Barker, for the respondent.

FIELD, J.—The constitution of South Carolina, adopted in 1868, declares that the property of corporations then existing or thereafter created, shall be subject to taxation, except in certain cases, not material to the present inquiry. The subsequent legislation of the state carried out this requirement, and provided for the taxation of the property of railroad companies; and the question presented is, whether the act of December, 1855, to amend the charter of the Northeastern Railroad Company, exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the state was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless the act granting the charter, or the renewal, amendment, or modification, in express terms excepted it from the operation of that law. The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The act amending the charter of the Northeastern

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Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company, when accepted by the corporators, constituted a contract between them and the state, and that the amendment, when accepted, formed a part of the contract from that date, and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations can not be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the state by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time, in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the state control over its contract with the corporators, which without that provision would be irrepealable, and protected from any measures affecting its obligation.

There is no subject over which it is of greater mo-

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ment for the state to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the state. It was so adjudged, at an early day, in *New Jersey v. Wilson*, 7 *Cranch*, 164; the adjudication was affirmed in *Jefferson Bank v. Skelly*, 1 *Black*, 436, and has been repeated in several cases within the past few years, and notably so in the cases of *Home of the Friendless v. Rouse*, 8 *Wall.* 430, and *Wilmington Railroad v. Reed*, 13 *Id.* 264; *ante*, 195. In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the state which give to the transaction the character of a contract. It is thus that it is brought within the protection of the federal constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the

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state and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the state. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The state only asserts in the present case the power under the reservation to modify its own contract with the incorporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

Decree reversed, and the cause remanded, with directions to dismiss the suit.

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15 Wallace, 460.

Supreme Court of the United States; December Term, 1872.

Taxes. Exemption by provisions of charter. A railroad company, which by its charter was granted an exemption from taxation for a limited period, was afterwards merged in another railroad company, which became invested with all the property, rights, and privileges of the former. *Held*, that the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired from the former, without express words, or necessary intendment to that effect.

Consolidation. Where two railroad companies are consolidated the

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presumption is, that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed.

Appeal to the supreme court of the United States from the circuit court for the district of South Carolina.

This was a suit in equity by stockholders of the South Carolina Railroad Company, against that company, the state auditor, and certain county collectors, to enjoin the company from paying and the others from collecting certain taxes imposed on the company under acts of the legislature of South Carolina, of April, 1868, and February, 1870.

The bill alleged that the company was, by its charter, exempt from taxation ; that no adequate legal remedy existed under the laws of the state to obtain redress ; and that the company declined to adopt any measures for obtaining it. The facts in the case are stated in the opinion.

A temporary injunction was granted, which was on the hearing made final ; and from the latter decree the defendants appealed to the supreme court.

D. H. Chamberlain, D. T. Corbin, and P. Phillips,
for the appellants.

J. Conner and A. G. McGrath, for the respondent.

BRADLEY, J.—The South Carolina Canal & Railroad Company was chartered by the legislature of South Carolina, in December, 1827, for the purpose of constructing a railroad or canal, or both, from Charleston to each of the towns of Columbia, Camden, and Hamburg, with the exclusive right for that purpose for thirty-six years. In a supplement, of January, 1828, amongst other things, it was enacted as follows :

“That during the first period of thirty-six years

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the stock of the company, and the real estate that may be purchased by them and connected with and be subservient to the works herein authorized, shall be exempted from taxation."

Under this charter the company constructed a railroad from Charleston to Hamburg only, a distance of nearly one hundred and forty miles. This road was completed in 1833, and it is admitted that the thirty-six years of exemption from taxation expired in 1869, and can not be invoked in support of the present suit.

In 1835, the Cincinnati & Charleston Railroad Company was incorporated by the legislature of South Carolina, for the purpose of establishing a communication by railroad between Cincinnati and Charleston, through the states of Kentucky, Tennessee, North Carolina, and South Carolina, with power to construct branches not conflicting with any chartered rights, and with power to use any section of the said railroad before the whole should be completed. By section 43 of this charter, it was enacted that the capital stock of this company, the dividends thereon, and all the property and estate, real and personal, belonging to said company, should be forever exempt from taxation, unless the dividends should exceed lawful interest. Subsequently, the project of extending the road into other states was abandoned, and the name of the company was changed, first to that of the Louisville, Cincinnati, & Charleston Railroad Company, and afterwards to that of the South Carolina Railroad Company. The company never built any portion of the railroad authorized by its charter, except from Branchville to Columbia, and a branch to Camden. The exclusive privileges conceded to the South Carolina Canal & Railroad Company rendered it difficult, if not impracticable, to effect a communication with Charleston without the consent of that company. Hence, negotiations for an amalgamation of interests

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between the two companies took place as early as 1837, and it was practically effected in that and the ensuing years. The mode in which it was done was that the stockholders of the South Carolina Canal & Railroad Company exchanged their stock in that company for an equal number of shares in the Louisville, Cincinnati, & Charleston Railroad Company (afterwards called the South Carolina Railroad Company), and received in addition a bonus of twenty-five per cent. By this means the latter company acquired the entire control of the former, and used the road of the former company between Branchville and Charleston, instead of building a separate road of their own.

In 1843, by an act of the legislature, passed December 19, this amalgamation was formally legalized. The section relating to this subject was expressed in the following terms :

“That whenever the written consent of all the stockholders of the South Carolina Canal & Railroad Company shall have been obtained, the said South Carolina Canal & Railroad Company shall be *merged* in the said South Carolina Railroad Company, and thereupon and thereafter all the rights, privileges, and property belonging to the said South Carolina Canal & Railroad Company shall be vested in the said South Carolina Railroad Company, and the said South Carolina Railroad Company shall be liable for all the debts and contracts of the said South Carolina Canal & Railroad Company ; and the stock and property of the said South Carolina Railroad Company shall be subject to the same liens and charges to which the stock and property of the said South Carolina Canal & Railroad Company may be liable, and in the same relative order in which the said liens and charges now stand.”

It is conceded that the terms of this law were complied with. And now the defendants in error contend

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that by the "merger" of the South Carolina Canal & Railroad Company in the South Carolina Railroad Company, the property of the former is held by the latter, with all the rights and privileges of its own charter attaching thereto, including the right of perpetual exemption from taxation.

If this is so, the state, by giving the latter company the power to acquire the property of the former, has lost a valuable prerogative in reference to that property, which it possessed up to the time when the act of 1843 was passed—namely, the right to tax the property after the expiration of the thirty-six years. Such a conclusion of the rights of the state ought not to be admitted without a clear expression of the legislative assent. It does not seem to us that the section in question contains such clear assent. In declaring that the one company shall be merged in the other, and that the rights, privileges, and property of the one shall be vested in the other, the legislature can not be understood to mean that the restrictions, limitations, and burdens affecting that property, and imposed for the benefit of the public or of individuals, shall not go with it. The rights and privileges go with it, and those rights and privileges can with difficulty be separated from the restrictions and duties by which they are measured and qualified. For example, the right to charge toll and freight can hardly be separated from the limitation of the rates of toll and freight which the charter of the merged company imposed. If the rates of freight were limited in that charter to five cents per ton per mile, can it be claimed that the new company is discharged from that limitation altogether? Or if its own charter allows a charge of ten cents per ton per mile, can it claim the right to charge ten cents for freight transported on the old road? If the hypothesis were reversed, and the old charter allowed ten cents, whilst the new allowed but five, the

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company would not hesitate, under the grant of the rights and privileges of the old, to continue to charge ten cents, as the former company had done. And they would have reason on their side. Had it been intended that the road and property of the old company should be owned and controlled by the new company under its own charter, in the same manner as its other property, it would have been easy to have so declared. Not having so declared, we can not presume that such was the intent. The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public, or to third persons, remain, and devolve upon the new company. This seems to us the most obvious and natural construction of the act, and leads to the conclusion that, as to the road, property, and works appertaining to the main line from Charleston to Hamburg, the South Carolina Railroad Company has no claim to exemption from taxation.

This view of the subject is corroborated by the decision of this court in the case of Philadelphia, Wilmington, & Baltimore R. R. Co. v. Maryland, 10 *How.* 376. It there appeared that the railroad line between Baltimore and Philadelphia had originally belonged to several distinct organizations chartered by the states of Maryland, Delaware, and Pennsylvania. One of these companies was exempt from certain taxa-

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tion, and it was claimed by the consolidated company that this exemption was transferred to it and affected all parts of the line. The act authorizing the union of the several companies provided that the "said body corporate so formed should be entitled . . . to all the powers and privileges and advantages then belonging to the former corporations." And the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be, that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.

It seems to us that this decision is directly in point, and governs that branch of the case now under consideration.

Reference is made, however, to certain decisions of the courts of South Carolina, which, it is contended, settle the question the other way.

The first case referred to is *South Carolina Railroad Company v. Blake*, 9 *Rich. (S. C.)* 233, which arose out of an attempt of the South Carolina Railroad Company to condemn certain land for its purposes in Charleston. The owner disputed the right of condemnation on the ground that the road and works had long before been located, and that, therefore, the power was gone. But the court held that the power existed under both charters, and might be exercised under either—first showing by affidavit the necessity

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of the use. The observations on the subject of taxation were *obiter dicta*; but, as far as the judgment goes it does not seem to us to militate against the views we have taken, but rather to confirm them by recognizing the continued vitality of the powers contained in the old charter. These can not be fairly claimed without accepting also its duties and burdens.

Another case was that of *The State ex rel. South Carolina R. R. Co. v. Hood, State Treasurer*, 15 *Rich. (S. C.)* 177, in which the company claimed exemption from a state income tax, imposed in 1867, under a law passed the year preceding, taxing the gross incomes of all railroads *not exempt by law*. The court of appeals held that the company was exempt by law, both under the thirty-six years' exemption in the old charter (which had not then expired), and under the exemption in the charter of 1835; and expressly waived the consideration of the effect of the act of union, passed in 1843. This case, therefore, furnishes no authority on the subject.

The remaining case is that of *South Carolina R. R. Co. v. Columbia & Augusta R. R. Co.*, 13 *Rich. (S. C.) Eq.* 339, decided in 1867. The defendant company, in that case, was chartered in 1858, with authority to construct a railroad from Columbia to Augusta. The South Carolina Railroad Company claimed that this would be an invasion of its exclusive privileges, as guaranteed in the charter of the South Carolina Canal & Railroad Company, and in that of the Cincinnati & Charleston Railroad Company. The learned chancellor, by whom the case was decided, assumed that the South Carolina Railroad Company was entitled to both guarantees; but he held that the projected road would not be an infringement of either. The guarantee given to the old company was that of an exclusive right (for thirty-six years from the completion of its road) of having a railroad between Charleston as one

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terminus, and the towns of Columbia, Camden, and Hamburg, respectively; and the guarantee given to the Cincinnati & Charleston Railroad Company was, that for thirty-six years from January 1, 1836, the state should not authorize any other road within twenty miles of its road, which should connect any points thereon, or should run in the general direction thereof; which exclusive privilege was not to extend to branches, but only to the main road. The chancellor held that the first guarantee secured the company only against other roads leading to Charleston, which the projected road did not do; and that the second guarantee secured the company only against roads interfering with the main line of the Cincinnati & Charleston Company, which the projected road did not do, because this main line, as originally contemplated, was to extend from Charleston, *via* Branchville and Columbia, to Cincinnati; and the only part of it ever constructed was the road from Charleston, *via* Branchville, to Columbia, with which the projected road did not interfere. This was all that the chancellor decided. It is true that, in the course of his opinion, he does say that after the acquisition of the old road, extending from Charleston to Hamburg, the charter of the South Carolina Railroad Company extended over it, the same as if that company had built it. But that proposition was not material to the conclusion to which he came. And when he assumed that the guarantee of the old charter still subsisted with regard to the old road, and based his judgment upon that assumption as one of its grounds, his opinion is virtually an authority for the other proposition, that the company must be regarded as holding the old road, so far as the rights of the public are concerned, subject to the conditions and limitations of that charter, as well as with its privileges and immunities.

Be this, however, as it may, we find nothing in this

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case or the other cases referred to, which, in our view, affects the authority of the case of Philadelphia, Wilmington & Baltimore R. R. Co. v. Maryland, or the soundness of the conclusion to which we have come, as before expressed.

The next inquiry relates to the line of railroad constructed by the South Carolina Railroad Company, under its own charter; being that portion between Branchville and Columbia and Camden. We have seen that the company, by its original charter, granted in 1835, had the grant of a perpetual exemption from taxation. We have already decided that it is competent for the legislative power to grant such an exemption. But it is contended on the part of the state, that this exemption, and all other chartered privileges of the company, are subject to alteration and repeal, by virtue of section 41 of an act, passed in December, 1841, by which it is declared—

“That it shall become part of the charter of every corporation, which shall, at the present or any succeeding session of the general assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority.”

Now, there can be no doubt but that the act of 1843, authorizing the consolidation of the two companies, or the merger of the one into the other, was an act modifying the charter of the South Carolina Railroad Company; but section 3 of that act withdrew the charter from the operation of the act of 1841. It was in these words:

“SECTION 3. The said South Carolina Railroad Company is hereby excepted from the provisions of

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the forty-first section of an act entitled An act to incorporate certain villages, &c. [referring to the act in question], but nothing herein contained shall be construed as exempting the said company from the provisions of the said forty-first section, upon any future grant, renewal, or modification of their charter."

The allegation on the part of the state is, that subsequent legislation was obtained by the company, which modified its charter, and thus rendered the whole charter liable to subsequent alteration and repeal. The legislation referred to consists of two several acts, namely: "An act to lend the credit of the state to secure certain bonds, *to be issued* by the South Carolina Railroad Company, and for other purposes, passed December 21st, 1865;" and "An act to amend the act last aforesaid, passed the 19th day of September, 1866." It is very doubtful whether these acts can be regarded as amending or modifying the charter of the company. They merely authorize the extension of certain bonds made by the company (which the state had guaranteed), by the issue of new bonds of like character, and the continuation of the mortgage for securing the payment of said bonds. But whatever may be thought on this point, section 3 of the act of 1843 clearly withdraws from the operation of the act of 1841 (by which power to amend and repeal is reserved) the entire charter of the company, except as to future grants, renewals, and modifications. Such future grants only were to be subject to alteration and repeal. This seems to us conclusive of the point raised, and no further argument is necessary.

It is our opinion, therefore, that the part of the line now under consideration is exempt from taxation, and that so much of the decree as relates thereto is correct.

Decree reversed, with directions to enter a decree

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making the injunction perpetual as to all that part of the line and railroad of said South Carolina Railroad Company which extends from Branchville to Columbia and Camden, and as to all property and stock of said company, properly apportionable and applicable to the said portion of line and railroad, and dismissing the bill as to all the residue of the railroad property and stock of said company, and that such further proceedings be had as may be necessary to perfect and carry out said decree.

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16 *Wallace*, 244.

Supreme Court of the United States; December Term, 1872.

Taxes. Exemption by amendment of charter. The property of a railroad company, not exempted from taxation by the original act of incorporation, was made exempt by an act amending the charter. An act subsequent to the amendatory act conferred upon another railroad company, previously incorporated, but which had never built its road, all the rights, powers, and privileges granted by the charter of the company first mentioned. *Held*, that among the privileges conferred upon the other company by this legislation, was the exemption of its property from taxation. The effect of the statute last mentioned could not be limited to the rights, powers, and privileges granted by the original act of incorporation. The power of the legislature to grant to such a corporation a perpetual immunity from taxation can not be questioned. And such a provision in the charter constitutes a contract which the state can not subsequently impair.

Error from the supreme court of the United States to the circuit court for the district of South Carolina.

This was a suit in equity by a citizen of Mississippi,

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a stockholder of the Cheraw & Darlington Railroad Company, incorporated by the state of South Carolina, to restrain officers of counties in that state in which the railroad was situated, from the collection of taxes imposed upon the stock and property of the company, under authority of the legislature of the state.

It appeared that the "Northeastern Railroad Company" was incorporated by the legislature of South Carolina, by an act passed December 16, 1851, entitled "an act to *incorporate* the Northeastern Railroad Company." This act contained no exemption of the company's property from taxation, and by its terms was to continue in force fifty years.

December 19, 1855, the legislature of the same state passed another act, entitled "An act to *amend the charter* of the Northeastern Railroad Company, and for other purposes," which enacted :

"SECTION 1. That the stock of the Northeastern Railroad Company and the real estate it now owns, or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be and the same is hereby exempted from all taxation during the continuance of the present charter of the said company."

Prior to these acts, on December 19, 1849, the legislature of the same state had, by an act entitled "An act to charter the Cheraw & Darlington Railroad Company," incorporated the company of that name, of which the complainant was a stockholder. This act, after authorizing the formation of the company and the raising of the stock, provided :

"SECTION 5. That for the purpose of organizing and forming this company . . . all the powers, rights, and privileges granted by the charter of the Wilmington & Manchester Railroad Company to that company shall be and are hereby granted to the Cheraw & Darlington Railroad Company," &c.

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The powers, rights, and privileges here referred to as granted by the charter of the Wilmington & Manchester Railroad Company, to that company, did not include any exemption of its property from taxation.

The Cheraw & Darlington Railroad Company thus incorporated in 1849, did not, up to December 17, 1863, build its road ; and on that day the legislature amended its charter by an act containing this provision :

“SECTION 1. That section 5 of an act entitled “ An act to charter the Cheraw & Darlington Railroad Company,” ratified the 19th day of December, A. D. 1849, be amended so as to read as follows, to wit :

“ That all the powers, rights, and privileges granted by the charter of the Northeastern Railroad Company are hereby granted to the Cheraw & Darlington Railroad Company, and subject to the conditions therein contained.”

Soon afterwards the Cheraw & Darlington Railroad was built and put in operation.

Notwithstanding these enactments, the defendants imposed certain taxes upon the stock and property of the company, claiming that the privileges granted to the Cheraw & Darlington Railroad Company by the act of December 17, 1863, cited above, were limited to those granted by the original act of incorporation of the Northeastern Railroad Company, and did not include the exemption from taxation granted to that company by the act amending its charter, passed December 19, 1855.

The circuit court granted the injunction prayed for ; and from its decree the defendants appealed to the supreme court.

D. H. Chamberlain, for the appellants.

T. G. Barker, for the respondent.

HUNT, J.—The stockholders of the Cheraw & Dar-

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lington Company contend that the act of December 19, 1855, entitled "An act to amend the charter of the Northeastern Railroad Company," &c., formed a part of the charter of the Northeastern Company in 1863, when the privileges conferred upon that company were granted to the Cheraw & Darlington Company.

The state contends that the privileges thus granted were limited to those conferred upon the Northeastern by its original charter or act of incorporation, passed in 1851.

All the "privileges," as well as powers and rights of the prior company, were granted to the latter. A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined. It contains the essential idea of a peculiar benefit or advantage, of a special exemption from a burden falling upon others.

There is nothing in the terms of the statute of 1863 to indicate that the legislature intended to limit the privileges conferred upon the Cheraw Company to those granted to the Northeastern Company by its original act of incorporation, and to exclude the important privileges contained in the amending act. The charter of the Northeastern Company, as it existed in 1863, was based upon the two acts of the legislature, passed in 1851 and 1855, respectively. The first act was entitled an "act to incorporate" the Northeastern Company. The latter act was entitled "an act to amend the charter of the Northeastern Company." A charter, in the sense here used, is an instrument or authority from the sovereign power, bestowing rights or privileges; as it is briefly expressed, it is an act of incorporation. Such was the obvious understanding of the word by the legislature of South Carolina. The first act was expressed as creating the incorporation of the company; the second, using a synonymous expression, purported to amend its charter. The words

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charter and act of incorporation were used convertibly. Whether it be said that the rights and privileges conferred upon the Northeastern, as they stood in 1863, existed in its charter or were derived from its incorporation amounts to the same thing. We have no doubt that all of them were intended to be granted to the Cheraw Company by the act of that year. The charter or incorporation of 1851 had been amended in 1855, and by an act which purported in its title not to create an original authority, but, by amending the original charter, to bestow additional powers upon the company. After the passage of the amended act, the Northeastern was, in law, as if it had originally been chartered with all the rights, powers, and privileges conferred upon it by the act of 1855. Such was the legal effect of the amendment; and such, no doubt, was the understanding of its effect by the legislature of South Carolina, when, in 1863, they conferred all its powers and privileges upon the Cheraw Company. The case shows that from 1849 to 1863 no sufficient inducements had been found to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, and has since then been and now is in operation. These facts serve to show—first, that there was, in this instance, the consideration that at any time exists for the granting by the legislature of such privilege to aid the acceptance of the same and the building of the road; and, secondly, the intention of the legislature, by omitting a reference to the original act of incorporation, to grant all the powers and privileges that had been at any time conferred upon the Northeastern Company.

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Another question is raised, to wit: That a legislature does not possess the power to grant to a corporation a perpetual immunity from taxation. It is said that the power of taxation is among the highest powers of a sovereign state; that its exercise is a political necessity, without which the state must cease to exist, and that it is not competent for one legislature, by binding its successors, to compass the death of the state. It is too late to raise this question in this court. It has been held that the legislature has the power to bind the state in relinquishing its power to tax a corporation. *Jefferson Bank v. Skelly*, 1 *Black*, 436. It has been held that such a provision in the charter of an incorporation constitutes a contract which the state may not subsequently impair. *Providence Bank v. Billings*, 4 *Pet.* 514; *Dartmouth College v. Woodward*, 4 *Wheat.* 518; *Binghamton Bridge*, 3 *Wall.* 51. These doctrines have been reiterated and reaffirmed so recently as the year 1871, in an opinion delivered by Mr. Justice DAVIS in the case of *Wilmington R. R. v. Reid*, 13 *Wall.* 264; *ante*, 195. They must be considered as settled in this court.

Judgment affirmed.

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85 *New Jersey Law*, 537.

Court of Errors and Appeals of New Jersey; March Term, 1871.

Taxes. Exemption by provisions of charter. The charter of a railroad company provided that the company should be subject to a certain specified tax, and that no other tax should be imposed. *Held*, that the exemption extended to a tract of gravel land purchased to pro-

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vide materials for the repair of the road, and also to a branch road connecting such gravel-pits with the main road.

The rule is established, by the course of decisions in New Jersey, that such an exempting clause will protect all property held by the company necessary to accomplish the end for which it was incorporated. And the exemption is not limited to property that is indispensable to the purpose of the incorporation; it extends to all things suitable and proper for carrying into execution the powers granted.

Error from the court of errors and appeals of New Jersey to the supreme court.

This was a certiorari to set aside a township tax upon a tract of land and a branch track from the main line of the prosecutor, the New Jersey Railroad & Transportation Company.

It appeared that that company had purchased the land mentioned, and built to it a branch from their main line, about one and three-quarters of a mile long, in order to obtain the gravel which was on the land, and which was required for the ballasting of the road, and for the maintaining and keeping it in repair. The branch was built and was used to transport the gravel more cheaply to the main line.

The authorities of the township in which the land and branch track were situated, assessed a tax upon them. This certiorari was brought to the supreme court to set aside the assessment; but the court affirmed it. The prosecutor, by writ of error, removed the judgment to the court of errors and appeals, and assigned errors.

J. C. Elmendorf, for the plaintiff in error.

Garrett Berry, for the defendant in error.

BEASLEY, Ch. J.—By section 6 of their charter (*Pamphlet Laws*, 1832), the New Jersey Railroad & Transportation Company are invested “with all the rights and powers necessary to the survey, laying out,

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and construction and repair of a railroad not exceeding sixty-six feet in width," &c. ; and by section 7 it is provided "that the said corporation may build bridges, fix scales and weights, raise embankments, or make any other works necessary for the construction, use, or enjoyment of the said railroad, and may also enter upon said road, and take possession of and use any materials necessary therefor, and if the said corporation and the owner or owners of such materials do not agree as to the price, the same shall be determined and settled in the manner heretofore provided for in the case of real estate or land." This same act provides that the corporation shall pay into the treasury a tax of one-half of one per cent. upon its capital stock, and that no other tax shall be imposed on said company. It is under this last clause that the plaintiffs in error claim that so much of the farm above mentioned as is useful on account of its gravel in the maintenance of their road, and the branch connecting this farm with their main track, are exempt from taxation.

Provisions in the charters of incorporated companies, similar to the one thus presented for construction, have, on several occasions, received consideration from the courts of this state, and, in some of their aspects, must now be understood as having a settled meaning. Thus, in an early case, it was decided that the exemption from taxation, according to the true import of the clause, extended not only to the privileges or franchises of the company, but had the effect to exonerate the company and its property generally from all taxes, whether for state, county, or township purposes. *State v. Berry*, 17 *N. J. L.* (2 *Harr.*) 80 ; *Camden & Amboy R. R. Co. v. Hillegas*, 18 *Id.* 11 ; *Camden & Amboy R. R. Co. v. Commissioners of Appeal*, *Id.* 71.

These cases conclusively settled the general rule, that the property of the corporation was to be free from taxation ; and it would seem, that upon principle, this

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should have absolved from this kind of burden everything which the corporate body had the legal right to acquire and hold. This, apparently, would have afforded the most definite and practical measure by which to ascertain the extent of the immunity of these companies. But a different rule was adopted, and is so completely established by a line of decisions as to forbid the least idea of a change. In the case of *State v. Commissioners of Mansfield*, 23 *N. J. L.* (3 *Zabr.*) 510, the doctrine was introduced, that it was not all the property of these incorporated companies, whose charters contained the exempting clause, that was protected, but such of their property only as was necessary to their operations and the accomplishment of the purposes of their charters. This principle has, over and over again, been the basis of judicial opinion, and has, at least twice, received the sanction of this court. *Gardner v. State*, 21 *N. J. L.* (1 *Zabr.*) 557; *State v. Flavell*, 24 *Id.* 370; *State v. Ross*, *Id.* 497; *State v. Blurdell*, *Id.* 403; *State &c.*, 26 *N. J. L.* (2 *Dutch.*) 519; *State v. Collector*, 29 *v. Collector*, *Id.* 541; *Cook v. State*, 33 *N. J. L.* (4 *Vroom*) 475.

It is obvious from this array of authority, that the rule, at present pertinent, is not, in the least degree, in doubt—the only question is as to its application. As has been already remarked, not all the property which an incorporated company may actually hold, is protected by the exemption, but such part only as is necessary to carry into effect the powers granted. The decisions cited, as well as the circumstances of the present case, show that the application of this rule has not been devoid of difficulty, and it seems plain that the embarrassment has arisen from the uncertain meaning, in this connection, of the word *necessary*. What property is *necessary* to a railroad company for the accomplishment of the objects of their incorporation? In the case of *State v. Commissioners of Mans-*

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field, already mentioned, this term, "necessary," is put in sharp contrast to the word "convenient." But this, I think, is clearly a mistake; and it is a mistake which has introduced confusion. The word necessary, in this use, is so far from being contra-distinguished from the word convenient, that the former term comprehends much that, in strictness, is embraced in the latter term. Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptation of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted, has always been deemed a necessary one. For example, in the case of *State v. Commissioners of Mansfield*, it is said: "Power to construct a railroad, and establish transportation lines upon it, necessarily includes the essential appendages required to complete and maintain such a work, and carry on such a business, as the power to erect and maintain suitable depots, car-houses, water-tanks, shops for repairing engines, &c., coal or wood yards for fuel for the use of their locomotives," &c. Now it will be observed that these appendages thus enumerated, are nothing more than conveniences, which, in the rigorous meaning of terms, are not necessary; yet no one will doubt that they plainly fall within the legal signification of that term. And it is to be further observed, that is the only force which in law is usually given to this word. Such was the limited meaning ascribed to it in the great case of *McCulloch v. State of Maryland*, 4 *Wheat.* 414. The constitution of the United States empowers congress to pass such

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laws as are "necessary and proper" for carrying into execution the powers granted, and it was insisted that, by this authority, such laws only could be passed as were indispensable. Referring to the term "necessary," Chief Justice MARSHALL says: "Does it always import an absolute physical necessity so strong, that one thing, to which another may be termed necessary, can not exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable." It is in this sense, I think, that the word is always used in clauses which confer upon incorporated companies the general authority which is to enable them to perform the function for which they are enacted. In short, the term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter. What are means thus suitable and proper, can not be reduced, it is probable, within the compass of any specific definition. But whatever doubts may occasionally arise with respect to this question, it does not seem to me that the circumstances of the present case should occasion any difficulty in the application of the rule of law which has been above considered. The plaintiffs in error have all the powers necessary for the construction and repair of their railroad, and they can take, by a compulsory proceeding, all materials necessary for this purpose. What they can take they can as clearly purchase, and in acquiring this land, with a view to the use of the gravel-pits upon it for maintaining their road-bed, it

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would seem that they did¹ that only which they had a plain right to do. Indeed, such an acquisition of property appears to approximate to an act of almost pure necessity. Nor does the branch connecting this property with the main road appear to me to be susceptible to the application of a different rule. This branch is the necessary instrument by which the materials purchased are conveyed to the point where they are wanted for use. I suppose it will not be denied that the company can effect such conveyance in some form—why not, then, effect it by this branch, which is the most economical form? A concession of the right to transport the materials seems to involve, as a necessary consequence, the right to the use of the most convenient and least expensive method. The purchase of so much of this farm as consists of beds of gravel, and the erection of this branch road for the uses in question, in my judgment, were acts which, in a legal sense, were necessary to effect the objects for which the plaintiffs in error were incorporated. The result, therefore, is that the branch road, and that portion of the farm which is or will be useful to the company, on account of its gravel, should be exempted from the tax which has been imposed upon them.

The test applied in the court below, to ascertain the immunity of a corporation from taxation by force of exempting clauses similar to the one under consideration, appears to me entirely inadmissible. It was supposed that such exemption never obtained, except with respect to property which the company could take by condemnation. This would subject to taxation almost all the appendages of these companies, such as depots, car houses, wood-yards, &c., for it will be found that in most charters, a mere privilege to purchase property for such purposes is conferred, and that it can not be taken *in invitum*. That property obtained for such objects can not be taxed, has long been the admitted

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rule—a rule which has received the express sanction of this court in the case of *Gardner v. State*, 21 *N. J. L.* (1 *Zabr.*) 557. The subject of taxation in that case was land which the company had acquired, but had not the right to take by condemnation; and such taxation was pronounced illegal.

The judgment should be reversed.

All concurred.

Judgment reversed.

THE CITY OF NEW HAVEN v. THE FAIR
HAVEN & WESTVILLE RAILROAD
COMPANY.

38 *Connecticut*, 422.

Supreme Court of Connecticut; September Term,
1871.

Assessments. Track of street railroad. The rails, sleepers, ties, and spikes of a street railroad, so laid into and attached to the soil of the street as to become a part of the realty, are real estate, and as such liable to assessment for the expense of paving the street through which they were laid, equally with any other real estate especially benefited by the improvement.

Where the charter of a city provides that an assessment of the expense of paving a street shall be a lien upon the property benefited, the question whether such a lien can attach to the track of a street railway assessed with a portion of the expense, is not important in determining the validity of the assessment. The right and power to assess are in no way dependent upon a lien. The lien is merely a security in addition to a proper remedy at law; and an action of debt will lie to recover such assessment.

Upon the question of the want of jurisdiction of the city to make

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such assessment, the railway company is not confined to its remedy by appeal from the assessment, given by the city charter, but may show such want of jurisdiction in defense to an action brought to recover the assessment.

Assessments. Estoppel. In an action to recover the amount of an assessment upon the property of a street railway company, of part of the expense of paving the street in which its track is laid, where the company has suffered the city to make the improvement and incur the expense, with full knowledge of the proceedings, and without objection, it is estopped from setting up the claim that its charter required it to pave the road covered by the track at its own expense.

Case reserved for advice to the supreme court of Connecticut, by the superior court for New Haven county.

This was an action of assumpsit and debt, brought by the city of New Haven to recover the amount of an assessment upon the defendant for paving part of a street in that city through which the defendant's track was laid. The facts in the case, and the questions involved, appear in the opinion.

C. R. Ingersoll, and *Doolittle*, for the plaintiff.

H. B. Harrison, with whom was *Blackman*, for the defendant.

CARPENTER, J.—This action is brought to recover the amount of benefits assessed upon the defendant for its proportional part of the expense incurred in paving a portion of Chapel street in New Haven, in and through which the defendant's railroad track is laid. The defense is, first, that the defendant is not liable to assessment; and secondly, if liable, that this action will not lie, for the reason that the assessment can only be collected by enforcing the lien.

1. A preliminary question is made by the plaintiff, and that is whether the defendant is not now precluded

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from making this defense, on the ground that it can only be made on an appeal from the assessment, as provided in the charter. The charter provides in substance, that, if any person shall be aggrieved by any such assessment, he may apply for relief to the superior court for the county of New Haven, and prescribes the time and manner of making the application. If the defendant has any defense, we think it is not precluded from making it in this action. It is not put on the ground that the assessment is disproportionate. If it was, it is quite clear that the defendant's only remedy would be by application for relief to the superior court. But the defense is more radical—it denies the *right* of the city to make any assessment. In this proceeding the city exercised limited and special powers. The extent of the jurisdiction is defined and limited by the charter. If it acted within its jurisdiction, the assessment is valid and binding unless appealed from. If it acted outside of its jurisdiction, the act is unauthorized and void, and confers no rights upon the city, and imposes no obligation upon the party assessed. It being a jurisdictional question, and relating to the proceedings of a tribunal with special and limited powers, we are clearly of the opinion that it is an open question in this action.

2. The next question in order is whether the defendant was liable to assessment, in respect either to its property or franchise. It is conceded that all the proceedings in making the assessment were regular in form, and that the improvement for which it was made was authorized by the city charter. The objection is chiefly that the charter does not authorize an assessment upon the defendant's property. The principal act (5 *Private Acts*, 769), after authorizing the court of common council to order certain improvements, including the one now under consideration, provides that said court "may, upon the execution of

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any such order, assess upon the person whose property is especially benefited thereby a proportional and reasonable part of the expense thereof, and may estimate the particular amount of such expense to be paid by any such person, &c." The word "property," as used in this act, is broad enough to embrace at least some of the property owned by the defendant, so that perhaps it is unnecessary for us to consider whether the mere franchise is or is not liable to assessment. The defendant's property consists in part of rails, sleepers, ties, and spikes, so laid into and attached to the soil in the street where the improvement was made as to become a part of the realty. That property so situated is real estate has been repeatedly decided. *Providence Gas Co. v. Thurber*, 2 *R. I.* 21; *City of Chicago v. Baer*, 41 *Ill.* 306; *Appeal of North Beach & Mission R. R. Co.*, 32 *Cal.* 499; *Farmers' Loan, &c. Co. v. Hendrickson*, 25 *Barb. (N. Y.)* 494. We entertain no doubt that this ought to be regarded as real estate, and such liable to assessment like any other real estate especially benefited, unless there is something in the charter showing that the legislature did not intend that this species of property should be assessed. We have carefully examined the charter and the various acts referred to, and are not satisfied that the legislature had any such intention. There is nothing in them limiting in express terms the meaning of the word property; and there is hardly enough in the provisions relating to liens to create such a limitation by implication. Without deciding the question whether a lien could or could not attach to this property, we are clearly of the opinion that the right and power to assess are in no way dependent upon a lien. The authority conferred by the legislature, and the proceedings of the court of common council pursuant thereto, created in the city a right to demand and receive from any person whose property was especially benefited thereby a certain sum

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of money, and imposed upon the person so benefited a corresponding obligation to pay said sum of money. The act then provides that the amount assessed shall be a lien on the property benefited, and prescribes the manner of securing and enforcing the lien. Now if the legislature intended that as the only mode in which the assessment could be collected, then there may be some force in the argument; but if it was intended merely as security, in addition to a proper remedy at law, then the argument is without force. We are inclined to think that the latter is the proper construction. We ought not to put such a construction upon the statute as to compel the city to resort to a proceeding in equity to collect the assessment, unless it is clearly demanded by the language used. If by implication, it should not rest on slight grounds, but should be clear and decisive. Such a construction would be prejudicial to the interests of both parties. A petition for a foreclosure is at best an indirect method of collecting a debt. It is oftentimes, perhaps usually, quite as expensive, and quite as likely to end after protracted litigation, as an action at law. Embarrassing questions may arise in respect to the title, and the parties interested therein, and in the end the petitioner may be obliged to take real estate, and convert it into money as best he may. We are not satisfied that the legislature intended that the city should necessarily be subjected to all this risk and inconvenience. On the other hand, if in every instance when the assessment is not paid promptly, the city is obliged to resort to a lien, it might seriously embarrass the other party, by subjecting his property to an incumbrance against his will. In addition to these suggestions, we would call attention to the fact that the statute provides that the lien shall not continue for a period longer than sixty days after the publication of notice, unless the certificate required is lodged with the town clerk. Now it can hardly be supposed that the

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legislature intended that a failure to lodge such a certificate within sixty days should work a forfeiture of the whole claim; and yet such is the inevitable result if the defendant's construction is correct. There is an obvious reason why the security should be lost; but we can discover none why the whole claim should be barred.

Another reason urged why this property should be exempt from assessment, is that the defendant's charter requires it to keep the portion of the street covered by and lying between the rails, and two feet on either side thereof, in repair at its own expense; and that the legislature could not have intended to authorize the city to interfere with this duty, and deprive the defendant of the privilege of keeping it in repair in its own way. It is a very interesting and important question, whether the defendant, by objecting to these proceedings at the commencement, could have practically defeated the whole improvement; but the case before us does not require us to decide that question. The defendant suffered the city to go forward and incur the expense, with full knowledge of the proceeding, and without objection at the time. The defendant must have known that the improvement would largely benefit it in the matter of repairs, that the proceeding was under the statute, and consequently at the expense, in part at least, of the parties benefited. There was no reason to suppose that the city was doing the work of the defendant at its own expense, or at the expense of other parties. The presumption therefore is, in the absence of any finding to the contrary, not only that the defendant consented to the making of the improvement by the city, but that there was an implied understanding that the defendant was to bear its fair proportion of the expense. We think, therefore, that the defendant should be estopped from setting up this claim.

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That the defendant is benefited to some extent by the improvement is apparent. Whether it is benefited to the extent of the assessment, and whether the assessment is a fair proportion of the whole expense for the defendant to pay, are not now open questions. Those questions could only be heard on an application for relief under the statute.

On the whole, we are satisfied that the defendant's property was properly assessed.

3. The defendant in the next place objects that this action will not lie, but that the remedy, if any, is by enforcing the lien. This objection has been substantially answered under the preceding head. It is only necessary to add, that if the views there expressed are correct, it follows that the plaintiff is entitled to a remedy at law to enforce its claim. As the statute gives no such remedy, any appropriate remedy may be used for that purpose. This action is *assumpsit* and debt joined. We have no doubt that the plaintiff is entitled to recover in one or the other of these forms of action, and perhaps in either, at its election. It being for a sum certain, and the claim originating in a statute which confers upon the plaintiff the right to receive and imposes upon the defendant the obligation to pay said sum, it is clear that the count in debt can be sustained. We advise judgment for the plaintiff.

BUTLER, Ch. J., dissented.

Others concurred.

Judgment for plaintiff.

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THE CITY OF ST. LOUIS v. THE ST. LOUIS
RAILROAD COMPANY.

50 *Missouri*, 94.

Supreme Court of Missouri; March Term, 1872.

Taxes. Street Railways. Under a statute which, in regulating the taxes to be paid by street railway companies, exempts them from liability for repairs of the street "outside of their tracks," a company having two parallel tracks on the same street is not liable for the expense of repairing the street between its two tracks, and not within either of them.

Appeal to the supreme court of Missouri, from the circuit court for St. Louis county.

This was an action to recover from the defendant the plaintiff's expenses in making certain repairs in the street between the tracks of the defendant. The facts are sufficiently stated in the opinion. Judgment was rendered for the defendant; from which the plaintiff appealed.

E. P. McCarty, city counselor, for the appellant.

E. C. Kehr, for the respondent.

ADAMS, J.—The defendant operates its road on Fifth street, in the city of St. Louis, on two parallel tracks, separated from each other by a space of three and a half feet, and in this space the city caused repairs to be made, and now seeks to hold the defendant liable for the cost of these repairs. The agreed case shows that the repairs in question were made subsequent to the act of the general assembly of March 3, 1869, relied on by the defendant as exempting it from responsibility for such repairs. Section 3 of this

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act provides, that "in addition to the annual tax herein provided, each of said railway companies shall pay a license to the city of St. Louis, to be fixed by ordinance of said city, not exceeding twenty-five dollars per annum for each car run by said companies respectively, and the taxes and license payable under the provisions of this act shall be in lieu of all taxes, burdens, and expenditures and repairs of streets outside of their track, required of such companies by former laws and ordinances."

Section 6 of this act requires each company to file with the secretary of state a written acceptance of its provisions before it becomes operative as to such company. The agreed case does not affirmatively show that this company had filed the required written acceptance. But as the act is set up as a defense by the company, and nothing to the contrary is shown in the agreed case, we will, for the purpose of this suit, presume that the written acceptance referred to was filed with the secretary of state. It is conceded that the defendant would be liable for the alleged repairs, unless exempted by the provisions of section 3, above quoted.

It seems to me that the language of the exemption clause is too plain to admit of a reasonable doubt as to its proper construction. Where a street railroad operates but one track, it is not pretended that it would be liable for repairs outside of such single track. The simple question is, whether the space between the two parallel tracks is outside of each of the tracks. It is very clear to my mind that such space is not inside of either track, but is between the two tracks, and outside of each. Under this view the defendant was not liable for the alleged repairs.

All concurred.

Judgment affirmed.

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THE CHICAGO, CINCINNATI, & LOUISVILLE
RAILROAD COMPANY v. WEST.

87 *Indiana*, 211.

Supreme Court of Indiana; November Term, 1871.

Contracts. Pleading. In an action against a railroad company, upon a promise by the company to pay for goods furnished by the plaintiff to a sub-contractor engaged in constructing the road, an answer setting up merely that the railroad company was not indebted to such sub-contractor, does not state facts sufficient to constitute a defense.

Drafts. Evidence. A draft or order drawn by one officer of a railroad company upon another, and accepted by the latter, may be regarded as the promissory note of the company. But evidence explaining the circumstances under which such a draft was accepted and delivered, is admissible in an action against the company for goods sold and delivered to a contractor, by direction of the company, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the draft.

Appeal to the supreme court of Indiana, from the circuit court of Miami county.

The history of this case and the questions involved are fully stated in the opinion.

N. O. Ross, and *R. P. Effinger*, for the appellant.

J. L. Farrar, and *L. Walker*, for the appellee.

DOWNEY, J.—The appellee sued the appellant, alleging in his complaint that the railroad company,

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through E. H. Leaming, its duly authorized agent, authorized and directed the plaintiff to furnish and deliver, on the credit of the defendant, to Maurice Quinn, a sub-contractor on the road of said company, who was engaged in the construction of the road-bed thereof, in the county of Miami, such groceries and supplies as might be needed for boarding and furnishing the laborers employed by said Quinn as such sub-contractor; that in pursuance of the authority and instructions so given by said Leaming, agent as aforesaid, plaintiff furnished and delivered, from December 1, 1867, to January 15, 1868, groceries, provisions, and supplies to said Quinn, for the purposes aforesaid, to the amount of five hundred and fifty-eight dollars and sixty-three cents, of which one hundred and fifty dollars was afterwards paid, and at the request and for the convenience of said defendant, charged the same upon his books to the account of said Quinn, a copy of which account is filed with the complaint; that thereafter, to wit, on January 14, 1868, the said railroad company, for its own convenience merely, but not in payment, satisfaction, or transfer of said debt, caused to be drawn by said Quinn a certain order on E. H. Scott, an agent in their employ, for one hundred and eighty-four dollars and thirty cents, which order was accepted by said Leaming, and delivered to plaintiff; and, also, on January 15, 1868, a similar order for two hundred and twenty-two dollars and thirty-three cents, was drawn and accepted by the same parties; copies of each of which are filed with the complaint; which orders were received by plaintiff as an acknowledgment of the amount of the indebtedness by the railroad company to that date, and for no other purpose or effect whatever; that the amount of said account, to wit, the sum of four hundred and seven dollars and sixty-three cents, with interest thereon from January 15, 1868, is due and wholly unpaid; wherefore, &c.

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The orders, copies of which are filed with the complaint, are as follows:

“\$135.30.

January 14th, 1868.

“MR. E. H. SCOTT:—You will please pay to the order of E. West one hundred and eighty-five dollars and thirty cents out of any money that may accrue to me out of a final settlement, or from monthly estimates after the laborers are paid.

MAURICE QUINN.

“Charged to C., C., & L. Railroad Company.

“Accepted on the within conditions.

E. H. LEAMING.”

“\$222.33.

PERU, IND., January 15th, 1868.

“MR. E. H. SCOTT:—You will please pay to the order of E. West two hundred and twenty-two dollars and thirty-three cents, amount due him from 1st of January to 15th of January, 1868, and charge

“Yours, MAURICE QUINN.

“Charged to C. C., & L. Railroad Company.

“Accepted after laborers are paid, if any means due Quinn.

E. H. LEAMING.”

The defendant demurred to the complaint, for the reason that it did not state facts sufficient to constitute a cause of action; its demurrer was overruled, and it excepted.

It then moved the court to strike out of the complaint all that relates to the giving of the orders, and that they were not received in payment of the claim for the goods sold; also, to strike out certain items from the bill of particulars filed with the complaint; which motion was overruled, and the defendant excepted, but filed no bill of exceptions.

The defendant then answered in three paragraphs; first, the general denial; and, second, as to one hundred and eighty-five dollars and thirty cents of the sum

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claimed, that the railroad company was not, on January 14, 1868, nor since, indebted to Maurice Quinn in that or any other amount, on final settlement or from monthly estimates, after laborers who were working for him were paid ; wherefore, &c.; third, as to two hundred and twenty-two dollars and thirty-three cents of the amount claimed, the railroad company was not, on January 15, 1868, nor since, indebted to Maurice Quinn in said sum, nor in any other sum, after the payment of laborers who worked for said Quinn, and that the defendant did not promise or agree to pay said sum, or any part of it, otherwise than is stated in said order for that amount ; wherefore, &c.

The plaintiff demurred, separately, to the second and third paragraphs of the answer, for the reason that they did not state facts sufficient to constitute a defense. His demurrers were sustained, and the defendant excepted.

There was then a trial by jury, verdict for the plaintiff for four hundred and sixty-two dollars, motion for a new trial by the defendant overruled, and judgment on the verdict.

The motion for a new trial was for the reasons, "first, the verdict of the jury is contrary to the evidence ; second, the verdict of the jury is contrary to the law and the evidence ; third, error of law occurring at the trial, and excepted to by the defendant at the time ; fourth, the court erred in the admission of testimony offered by the plaintiff, and objected to by the defendant ; fifth, the court erred in sustaining the demurrer of the plaintiff to the second paragraph of the defendant's answer ; sixth, the court erred in sustaining the demurrer of the plaintiff to the third paragraph of the defendant's answer ; seventh, the court erred in its instructions to the jury."

All the evidence is set out in the bill of exceptions, but there are no instructions in the record.

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The appellant has assigned the following errors: first, the overruling of the demurrer to the complaint; second, the overruling of the motion to strike out parts of the complaint; third, sustaining the plaintiff's demurrer to the second paragraph of the defendant's answer; fourth, sustaining the demurrer of the plaintiff to the third paragraph of the defendant's answer; fifth, in admitting illegal testimony offered by the plaintiff, and objected to by the defendant; sixth, in refusing to grant a new trial.

We see no valid objection to the complaint. It is true that it might have gone on the ground of goods sold and delivered, and when the orders were pleaded as payment, the plaintiff might have replied, avoiding or denying that they were received in payment. The facts would then have appeared in the record substantially as they are set out in the complaint. Although it is unusual, we see no reason why the plaintiff may not anticipate, in his complaint, the defense which he apprehends the defendant will rely upon, and avoid or deny it.

The motion to strike out presents no question, for the reason that the point was not reserved by a bill of exceptions. *Swinney v. Nave*, 22 *Ind.* 178.

The matter set up in the second paragraph of the answer was not a defense to the claim for goods sold and delivered. If the company agreed to pay for the goods furnished to the sub-contractor, it was immaterial whether the company was indebted to him or not. Had the suit been on the orders, such an answer would have raised a material question.

The third paragraph of the answer is a good defense to the part to which it is pleaded, because it not only alleges that the company was not indebted to Quinn, so as to make it liable to pay the order, but it also alleges that the company "did not promise or agree to pay said sum, or any part of it, otherwise than is

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stated in the order." The demurrer to this paragraph should have been overruled. But this error can not reverse the judgment, for the reason that the general denial, which was filed, put the same matter in issue, and under this issue the same evidence was admissible as would have been admissible under the third paragraph of the answer. *Harrison v. Bryant*, 5 *Ind.* 160.

The only objection which we find in the record to any evidence offered by the plaintiff is this: When Mr. Neff was testifying on behalf of the plaintiff, he stated, "that about the date of the above orders, in a conversation between the witness and Mr. Leaming, in relation to the goods got by Quinn, Leaming said they wanted to get rid of him (Quinn), and that the orders were drawn up and accepted by Leaming in their present form, at the instance of Leaming, and for the accommodation of the company." The defendant did object to this statement, "explaining said orders," as the bill of exceptions says, and, the court having overruled the objection, the defendant excepted. This evidence was admitted, we presume, in support of the allegation of the complaint, that the orders were given for the convenience of the company or its officers, and not in extinguishment of the claim for goods sold. For this purpose we think it was admissible. Whether the orders were received as payment of the claim for goods sold, or for some other purpose, was a question of fact for the jury. The evidence was not to contradict, nor did it contradict, the orders. An order or bill of exchange drawn by a person on himself may be regarded as his promissory note, and may be declared upon and treated as such, and this rule is applied to corporations, when an order has been drawn by one officer thereof on another. *Marion, &c. R. R. Co. v. Hodge*, 9 *Ind.* 163. Let it be supposed, then, that the orders in question are to be treated as the promissory notes of the railroad company, what is the effect of the receiving of

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them by the plaintiff? It seems to be the law, that the giving of the debtor's promissory note for a precedent debt is not an extinguishment or satisfaction of the pre-existent debt. At all events, it may be shown by evidence whether it was or was not received as such. 2 *Greenl. Ev.*, § 521; 2 *Am. L. Cas.* 242. If the orders were received by the plaintiff, neither as absolute nor conditional payment of the pre-existent debt for the goods sold, but only for the convenience of the company, we do not see any objection to the proof of the fact. The plaintiff had taken upon himself the proof of it by alleging the giving of the orders, and stating the reason for so doing. It was one of the facts in the case, and we think the court committed no error in allowing proof of it. The only objection to the evidence was, that it contradicted the written orders, and we hold that it was not objectionable on this ground. This is all that we decide on this point.

The last question is as to the correctness of the ruling of the court in refusing to grant a new trial on the motion of the defendant, on the ground of the insufficiency of the evidence to justify the verdict of the jury. We can not reverse the judgment on this ground.

Judgment affirmed, with costs.

GILSTRAP v. THE ST. LOUIS, MACON, &
OMAHA AIR LINE RAILROAD COMPANY.

50 *Missouri*, 491.

Supreme Court of Missouri; August Term, 1872.

Drafts. An instrument in writing in the form of a bill of exchange, drawn by the president of a railroad company upon the treasurer of the company by order of the directors, and attested by the

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secretary,—*Held*, to be a bill or note for the direct payment of money, within the meaning of a statute regulating the time to answer in actions upon bonds, bills, or notes for the direct payment of money or property.

Appeal to the supreme court of Missouri from the court of common pleas for Macon county.

This was an action upon an instrument in writing, a copy of which is set forth in the opinion, where also the history of the action is fully given. Judgment for the plaintiff was given by default, and two motions subsequently made by the defendant to set aside the judgment were denied. The defendant appealed.

Berry & Wing, for the appellant.

Eberman & Williams, for the respondent.

WAGNER, J.—Plaintiff brought this action in the court below upon the following instrument of writing:

“\$1,771.09. Office of the St. Louis, Macon, & Omaha Air Line Railroad Company, Macon, Missouri, April 18, 1871.

“Treasurer St. Louis, Macon, & Omaha Air Line Railroad Company will pay to A. L. Gilstrap, or order, seventeen hundred and seventy-one dollars and nine cents.

“Done by order of the Board of Directors.

“JOHN DOUGHERTY, President.

“Attest: D. K. Turk, Secretary.”

On the fifth day of the court, no answer having been filed, judgment was given for the plaintiff by default, which was afterwards made final. On the eighth day of the term defendant filed its motion to set aside the judgment, because the same was rendered before the time had expired in which the defendant was entitled to file its answer. This motion was by the court overruled; and afterwards the defendant filed another

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motion to set aside the judgment and grant a new trial, stating that it had a meritorious defense to the action, which motion, at the instance of the plaintiff, was stricken out on the ground that it was not filed within four days after the rendition of the judgment.

The grounds that defendant relies upon in support of its first motion are that the writing sued on is not an instrument which compelled it to answer within the first two days, and that it was entitled to six days within which to file its answer, and therefore the judgment of the court was erroneous.

The statute provides that where the suit is founded upon a bond, bill, or note for the direct payment of money or property, and the defendant has been served with process, he shall demur or answer to the petition on or before the second day of the term, &c. *Wagn. Stat.* 1014, 5. The instrument sued on was a bill or note for the direct payment of money, within the meaning of the statute; and it follows, therefore, that the court did not err in rendering judgment in default of an answer.

The decisions are numerous defining the character of writings similar to the one sued on, and some have held them to be bills of exchange, while others have assigned to them the qualities of promissory notes. The second motion was properly stricken out because not filed within four days after the trial; besides, it set up no good or valid reason for the delay in making the defense. *Wagn. Stat.* 1059, § 6. It is contended here that the instrument is void because it was not stamped, but this point was not raised or brought to the attention of the court below by motion or otherwise at the proper time, and is not available here.

All concurred.

Judgment affirmed.

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TURNER v. THE CHILLICOTHE & DES MOINES
CITY RAILROAD COMPANY.

51 *Missouri*, 501.

Supreme Court of Missouri; February Term, 1873.

Officers. The president and treasurer or other managing officers of a railroad company have power, without special authority from the board of directors, to employ attorneys to defend suits brought against the company.

Appeal to the supreme court of Missouri, from the court of common pleas of Livingston county.

The history of the case and the questions involved are stated in the opinion.

A. H. Vories, for the appellant.

Turner & Collier, for the respondent.

SHERWOOD, J.—This action was brought in the common pleas court of Livingston county, by Turner and Collier, against The Chillicothe & Des Moines Railroad Company, and Moore and Noland, for recovery for legal services alleged to have been jointly rendered at the special instance and request of said railroad company, and said Moore and Noland, in defending them in a large number of suits before Lucien Gordon, James C. Bernard, and ——— McBride, respectively, as justices of the peace; and a bill of items, referred to in the petition, was annexed thereto, showing in what causes the alleged services were performed. Defendants Noland and Moore, filed their

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separate answer, denying the allegations of the petition, and the railroad company also filed its separate answer, denying the allegations aforesaid, admitting that it was defendant in various suits presumed to be the same set forth in plaintiff's petition, but averring that it made no defense to said suits, but only permitted plaintiffs to defend the same in its name, at the instance and request, and for the exclusive use and benefit of the defendants Noland and Moore. That plaintiffs, before said services were rendered, were advised by said railroad company, that it would not pay fees for the defense of said suits, and that such defense would only be permitted to be made by plaintiffs as the attorneys and for the use and benefit of their clients, Noland and Moore.

To the answer last mentioned, a reply was filed, denying the allegations thereof.

On the hearing of the cause, a jury was impaneled, and the plaintiffs introduced and read in evidence a letter, dated October 17, 1870, addressed to plaintiffs by the president and attorney of the railroad company, Shanklin, fully approving their action in signing appeal bonds, "in several cases against the company in which Noland and Moore were interested;" stating that the necessary power of attorney would be sent as soon as it could be signed by the secretary, and requesting plaintiffs in the mean time to do all that they deemed necessary for the interest of the company, as well as that of Noland and Moore.

Plaintiffs also read in evidence a letter from the same party to them, two days later in date, acknowledging the receipt of a letter from them, addressed to Noland and Moore and said Shanklin, and replying to said letter by a promise to come down to court and see plaintiffs in relation to the subject-matters of the letter, that the writer presumed they, the plaintiffs, desired to be indemnified against liability, in consequence

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of having signed the bonds, &c., and that this was right.

Plaintiffs then offered in evidence a power of attorney, dated October 18, 1870, duly executed by said railroad company to plaintiffs, reciting that they had been previously authorized, as the attorneys of said company, in certain cases then pending before Esq. Gordon, against said company; and that in pursuance of such power, they had signed certain appeal bonds, and granting plaintiffs "full powers and authority to further defend all suits now pending in any of the courts of Chillicothe against said company," and "ratifying and confirming all acts and things which have been done, or may hereafter be done by said Turner & Collier, in respect to the defense of said causes or appeals thereon," &c. The railroad company objected to the reading of this instrument in evidence, on the ground that, according to plaintiff's own showing, it bore date long subsequent to the rendition of the greater portion of the services for which suit was brought. This objection was overruled, said instrument read, and said company excepted.

Turner, one of the plaintiffs, testified that he was employed by Shanklin, the said president of the railroad company, by letter, and thereupon read said letter, which was dated June 10, 1870, and requested said Turner to assist him in all legal matters in which the said company was a party or had an interest, at Chillicothe, and in Livingston county, to which said Shanklin could not attend, and stating that, by the terms of this contract between the railroad company and Noland and Moore, the latter were to save the former harmless from all liens for work and labor done, &c.

This letter further stated that the suits then pending before Esquire Gordon against the company, were regarded as involving its credits, and that it desired the matters ventilated; more especially as Noland and

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Moore would pay the expenses; and concluded by requesting Turner to give those cases his personal attention, with such assistance as Noland and Moore might choose to employ, &c.

Turner then proceeded to testify that the suits were commenced in 1870, were for wages of laborers on the Chillicothe & Des Moines Railroad, were brought against the railroad company, under the statute, to secure and enforce a lien on the road-bed of said company; that the suits mentioned in the exhibit to plaintiff's petition were before Esquire Gordon, justice of the peace; that Noland and Moore asked to be made parties defendant to those suits, claiming to be parties interested; that plaintiffs (Turner & Collier) accordingly procured the necessary order, making said Noland and Moore codefendants, tried one or two of the cases (out of the thirty or forty in suit), were beaten, let the rest go by default; and then filed in such cases the necessary motions to set aside the judgment, affidavits, and bonds for appeal—an Herculean task, which occupied plaintiffs two or three days in accomplishing; that Gordon promised to grant the appeals; that subsequently Gordon raised some objection to the bonds; but having had them satisfactorily explained to him, promised to grant the appeals. That the justice, however, instead of doing this, subsequently issued executions on all these judgments, and the property of the railroad company was levied upon and advertised for sale.

Plaintiffs then proposed to prove by the witness that they then brought suit in the common pleas court of Livingston county to enjoin and did enjoin the sales under such executions; but the railroad company objected, on the ground that such services were not alleged in the petition. This objection was overruled, said defendant excepted, and the testimony was admitted. And under a like objection of said defendant

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and with the additional one that the necessity for such services was created by the blunder of plaintiffs, the witness was permitted to testify that upon a change in constables the property was again advertised for sale, and plaintiffs again sued out an injunction from said common pleas court, to prevent a sale of said property, and said defendant again excepted. Said Turner, also under like objection and exceptions of said defendant, testified that they, the plaintiffs, sued out a mandamus to compel said Gordon, the justice of the peace, to grant said appeals; that the first injunction suit and the proceedings for a mandamus were decided adversely to the railroad company, and plaintiffs took those cases by appeal to the supreme court; that the second injunction proceeding was still pending in the common pleas court when the suits before the justice of the peace were settled and adjusted; that the services rendered were worth more than four hundred dollars, the amount charged, and that Noland, on the part of Noland and Moore, agreed to allow plaintiffs that amount. Said Turner then, under the objections of said defendant that the authority of Ballew, the treasurer of said railroad company, to bind said company, had not been proven; that he had employed plaintiffs on behalf of said defendant, was allowed to testify that said Ballew was in the office of plaintiffs while one of said injunction suits was pending, and promised to pay plaintiffs' fees, and charge the same to Noland and Moore, who were then solvent men, on a contract with the railroad company, which had the funds of said Noland and Moore then in its hands. And said witness further testified that the suits were begun in June, 1870; that Noland and Moore alone were responsible for the debts then sued for; that witness first went into the suits as attorney for said railroad company; that he only had the authority of the latter, dated June 10, 1870, to act as such attorney; that

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Noland and Moore also employed plaintiffs to attend to the cases referred to; that Shanklin wanted witness to ventilate the matter; that prior to that time witness had been employed by the railroad company; that he did not understand that Noland and Moore were to pay plaintiffs; that witness signed the name of the railroad company to the bonds, by Turner & Collier, and witness thought the bonds bound the railroad company, and if not that they bound plaintiffs; that it was Noland and Moore's business to defend the suits, in which there was some thirteen thousand dollars sued for, and that he never presented his bill to said company, nor demanded a fee from it, or its agents or officers, except what was said to Ballew.

J. H. Shanklin was then introduced as a witness by plaintiffs, and testified that in the summer of 1870, Ballew was the treasurer of the railroad company, witness, the president and attorney, and transacted its executive business; that Ballew sometimes paid claims which had not been allowed by the board, and the board usually allowed such claims; that Ballew had no authority to employ attorneys, nor to pay them for the railroad company, and that on two or three occasions, he (Ballew) came to Chillicothe with means to pay the litigated claims, if necessary to prevent the sale of the railroad property under the executions referred to by Turner.

Collier, one of the plaintiffs, was then introduced as a witness, and testified that about the time these suits were instituted, Noland and Moore employed him to defend them, and they stated that they were authorized by the railroad company to employ him, and that said company had since then recognized him as its attorney; that the executions referred to by Turner were issued against the company; that the labors of himself and coplaintiff were great in getting up the appeals which, in the opinion of witness, were skillfully perfected;

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that the bonds were good, and Noland and Moore's names on them as principals, and that witness was present when the conversation referred to by Turner took place with Ballew. The railroad company here objected, on the same ground as before, to any declaration made by Ballew; but this objection was overruled, and the witness permitted to testify, and said defendant excepted. Witness then stated that Ballew was solicitous that the injunction should succeed; provided that the railroad company would pay for their services, and told them to go ahead and make the best fight they could. And the witness further testified that the services rendered by plaintiffs were worth four hundred dollars; that he appeared in the cases at the instance of Noland and Moore; was recognized by the railroad company as its attorney, July 19, 1870, and prior to that time had appeared in the suits; that witness demanded a fee of the company; that he did not know in what capacity Turner acted, though he understood he was attorney for the company; that Turner assisted him in getting up the mandamus; that the injunction and mandamus were pending when the cases were compromised, and that Turner and himself got letters and a power of attorney, approving their action in the cases, and that he had never heard any objections made, &c.

The plaintiffs rested, and the railroad company introduced J. H. Shanklin as its witness, who testified that at the time plaintiffs claim to have rendered services, he was president and attorney of said railroad company; that prior to writing the letters to Turner, of June 10, 1870, he had given Noland and Moore authority to use the name of the company in resisting the claims of some hands who had filed liens on the road; that he had been advised that Noland and Moore had employed or would employ plaintiffs to defend said suits; that on learning from a messenger that Gor-

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don, the justice, would not permit Noland and Moore's attorneys to appear without authority from witness, he wrote two letters to Turner, one for his use in court, and the other with some private advice; that the letter dated June 10, 1870, in evidence, might be one of the letters, though witness thought he had expressed himself more unequivocally as to by whom the fees were to be paid; that the next witness heard from the suits was by letter, directed by plaintiffs to Noland and Moore and witness, to which the letter of witness of July 19 was a reply; that during the week after said letter was written, witness talked with plaintiffs, who informed him that Gordon had refused to grant the appeals; that witness told them that the railroad company would not act in the matter further than to permit Noland and Moore to use its name in their defense; that the company had no interest in those suits, as Noland and Moore were bound by their contract to keep the road clear of all liens; that the power of attorney was executed at the request of plaintiffs; that he was willing to aid, and hence the letter and power of attorney; that he distinctly understood that plaintiffs were defending the suits for Noland and Moore, and were only using the name of the company as a necessity; that plaintiffs never demanded any fee of him, and that he afterwards compromised the cases, having doubts whether the appeals could be enforced.

Here a letter from Turner, one of the plaintiffs, dated October 15, 1870, to said Shauklin, and to Noland and Moore, was introduced, requesting that a power of attorney should be made by the railroad company to plaintiffs, recognizing and ratifying the appeal bonds which they had executed, and empowering them to execute new bonds, and stating that said Turner was aware that the railroad company was not especially interested in the appeals, &c., &c.

The said railroad company then read in evidence a

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clause from the contract between said company and Noland and Moore, by which the latter agreed to save the former harmless as to claims for labor done or materials furnished, and giving the company the right to retain a sufficient amount of money to discharge such claims. This was all the evidence.

The defendants then asked their first instruction in the nature of a demurrer to the evidence to the effect that the plaintiffs having failed to establish a partnership, or any other relation between them at the time the services were performed, which would entitle them to a joint action against any of the defendants, and having failed to prove that anything was due them jointly, the jury should find for defendants, which was refused, and defendants excepted.

The fourth instruction was to the effect that if the services were so unskillfully performed, and in such manner as to be worthless, the jury should find for defendants.

And the seventh required the jury to disregard all testimony as to the services of plaintiffs in the mandamus and injunction suits. These instructions being refused also, defendants again excepted.

The court then, at the instance of the defendants, gave five instructions (two of them with but slight and just modifications), which presented the defendant's view of the law of the case very favorably, and then gave, against the objections and exceptions of the defendants, several instructions on behalf of the plaintiffs, in which, taken as a whole, there is no material error, and the jury thereupon found for the plaintiffs, and after moving unsuccessfully for a new trial and in arrest, defendants bring this cause here by appeal.

There was no error in the action of the court in admitting testimony showing that plaintiffs had rendered services in other cases than those mentioned in the exhibit annexed to the petition. Aside from the fact that

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the proceedings by mandamus and to enjoin were inseparably blended with and in furtherance of the proper defense of the suits before the justice, the defendants failed to take the statutory steps, showing that they had been misled by the alleged variance between the pleading and the proof. An affidavit setting forth in what respect a party has been misled, is the *only test*, under our statute, of the materiality of the discrepancy between *allegata* and *probata*. And even then the variance is not necessarily fatal; for the court may order an amendment upon terms. 2 *Wagn. Stat.* § 1, p. 1033; *Fischer v. Max*, 49 *Mo.* 404.

And by an examination of section 2 of the act referred to, it will be seen that an amendment is not, where the variance is immaterial, absolutely essential; for "the court may direct the facts to be found according to the evidence." And for the reasons above stated, there was nothing incorrect in the refusal of the seventh instruction of defendants.

The court very properly refused to give the first instruction asked by defendants, as there was not an entire absence of testimony on the point referred to therein; and the court, had it given that instruction, would thereby have usurped the province of the jury, and taken the case away from these triers of the facts.

There was nothing on which to base the assumption that plaintiffs' services were unskillfully performed, or were worthless, and consequently the fourth instruction of defendants was unsupported by the testimony, and was therefore rightly refused.

The testimony as to the promises of Ballew, the treasurer of the railroad company, was competent, and there was no error in its admission. *Western Bank v. Gilstrap*, 45 *Mo.* 419, and cases cited.

The power of attorney to the plaintiffs from the railroad company was clearly admissible, although made at a date subsequent to the performance of a

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large portion of the services. That the recognition and ratification of a previously performed act are tantamount to its antecedent authorization, is a proposition too plain for discussion or the citation of authorities.

The case was fairly tried ; the verdict was supported by the evidence, there was no error committed materially affecting the merits of the action, and the right party in the court below had judgment, which will be affirmed.

VORIES, J., did not sit.

Others concurred.

Judgment affirmed.

WILLIAMS v. THE NORTH MISSOURI RAIL-
ROAD COMPANY.

50 *Missouri*, 438.

Supreme Court of Missouri ; August Term, 1872.

Jurisdiction. Actions. Upon construing together the statutes of Missouri, relative to the jurisdiction of justices of the peace over railroad corporations,—*Held*, that a justice of the peace has jurisdiction of an action against a railroad company on a contract of affreightment, to the extent of ninety dollars.

Error from the supreme court of Missouri to the circuit court of Macon county.

This was an action on a contract of affreightment.

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The history of the case, and the questions involved, are stated in the opinion.

Williams & Eberman, for the plaintiffs in error.

John F. Williams, for the defendant in error.

ADAMS, J.—This suit was commenced before a justice of the peace, on a contract of affreightment made by the defendant as a common carrier. Judgment was rendered by the justice in favor of the plaintiffs, and the defendant appealed to the circuit court, and in that court filed a motion to dismiss the suit, upon the ground that the justice had no jurisdiction over the defendant on contracts of affreightment. This motion was sustained by the circuit court, and the suit dismissed, and the plaintiff has brought the case here by writ of error.

The defendant relies on section 3 of an act entitled "An act amendatory of the charter of the North Missouri Railroad Company," approved February 18, 1865. *Sess. Acts* 1865, 89. That section reads as follows: "SEC. 3. That justices of the peace shall have jurisdiction to the same extent over this company, in all actions of trespass for killing stock, which they now have over natural persons, and they shall have and exercise no other jurisdiction than as above provided."

In construing this section we must take into consideration the laws that were in force at the time it was enacted, in order to ascertain the true intention of the legislature. When this section was enacted, the act of 1861, to extend the jurisdiction of justices of the peace in cases for killing stock, without regard to the value, was in full force, *Sess. Acts* 1861, 23, and also the general railroad law of 1855 was in force, section 38 of which provided that "all existing railroad corpora-

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tions shall be exempt from the jurisdiction of justices' courts, except as in this act and in their own charters provided." *Rev. Code* 1855, 430.

In view of these laws, it is evident to my mind that the proper construction of section 3 of the amended charter of defendant is, that justices of the peace, in trespass for killing stock, were to have only such jurisdiction, and no other, as they had over natural persons. That section was not intended to exempt them from jurisdiction in any other cases than the trespass cases referred to. There was no necessity for doing this, as it was already exempt by section 38 of the general railroad law, above referred to. But this general railroad law was revised in 1865, and is comprehended in the general statutes of 1865. Section 38 was omitted in the revision of 1865, and was repealed under the general clause repealing all laws that had been revised in 1865.

So justices of the peace now have jurisdiction over contracts of affreightment made by railroad companies, to the extent of ninety dollars, and the court erred in dismissing this suit.

All concurred.

Judgment reversed

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MIDDOUGH v. THE ST. JOSEPH & DENVER
CITY RAILROAD COMPANY.

51 *Missouri*, 520.

Supreme Court of Missouri; February Term, 1873.

Jurisdiction. Actions. An action against a railway company, incorporated under the laws of another state, can not be sustained in Missouri, unless such company has its chief office or place of business within the latter state.

Appeal to the supreme court of Missouri from the court of common pleas of Buchanan county.

This was an action against a railroad company, incorporated under the laws of the state of Kansas. The defendant appeared, and demurred, alleging that no jurisdiction was obtained by the court over a foreign corporation by service of summons. The demurrer was overruled, and the same matter pleaded by way of answer. The petition was dismissed, and the plaintiff appealed.

Hill, Carter, and Van Waters, for the appellant.

Doniphan, and Baldwin, for the respondent.

WAGNER, J.—The court below dismissed the petition in this case, and the only question presented for decision is, whether it had jurisdiction over the defendant.

The action was brought against the defendant, a foreign corporation, incorporated by the laws of the state of Kansas, and it was not alleged, nor was it anywhere shown or pretended, that it had its chief office

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or place of business in this state. The construction placed upon our statute has been uniform. If the chief office or place of business is within this state, as designated by the statute, then the foreign corporation is regarded as a domestic one, and amenable to the jurisdiction of our courts by the common process of summons. Where, however, its office or place of business is not here, then it must be proceeded against as a non-resident, by attachment. *Farnsworth v. Terre Haute, &c. R. R. Co.*, 29 *Mo.* 75; *St. Louis v. Wiggins Ferry Co.*, 40 *Id.* 580; *Robb v. Chicago, &c. R. R. Co.*, 47 *Id.* 540.

Let the judgment be affirmed.

ADAMS, J., dissented.

Others concurred.

Judgment affirmed.

SLAVENS v. THE SOUTH PACIFIC RAILROAD COMPANY.

51 *Missouri*, 308.

Supreme Court of Missouri; January Term, 1873.

Actions. Residence. In construing a statute allowing suits against corporations to be commenced in any county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business,—such as 1 *Wagn. (Mo.) Stat.* 394, §§ 26, 28,—a railroad corporation should be considered a resident of any county through which its line of road passes, and in which it has an agent upon whom process can be served.

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Appeal to the supreme court of Missouri from the circuit court of Laclede county.

This was an action before a justice of the peace for Laclede county, commenced by service of summons upon the station agent of the defendant. Upon the trial, the plaintiff recovered judgment, and defendant appealed to the circuit court.

The plaintiff moved to dismiss the appeal, on the ground that it was not perfected within the time required by statute for appeals by residents of the county. The circuit court dismissed the appeal, and from this decision the defendant appealed to the supreme court.

James Baker, and *J. N. Litton*, for the appellant.

J. D. Mathews, for the respondent.

WAGNER, J.—Plaintiff commenced his suit against the defendant before a justice of the peace in Laclede county, and summons was served upon defendant's station agent in that county.

At the trial judgment was given for the plaintiff, and defendant at the time gave notice of its intention to take an appeal to the circuit court, but failed to file a bond or affidavit within ten days.

Thirteen days after the trial, affidavit and bond were filed, and the case was taken to the circuit court. In that court the plaintiff filed his motion to dismiss the appeal, because the same was not taken and perfected within ten days. His motion was sustained, and defendant appealed to this court.

The only question is whether the defendant, whose track runs through Laclede county, is a resident or non-resident, within the meaning of the act in reference to granting appeals.

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The statute provides that no appeal shall be allowed, unless it be made within ten days after the judgment rendered, or where judgment is by default or non-suit, within ten days after the refusal of the justice to set aside the default or nonsuit, and grant a new trial; but if the party is a non-resident of the county where the suit is instituted, then he is allowed twenty days within which to make his appeal. 2 *Wagn. Stat.* 847, § 3.

Suits against corporations may be commenced in any county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business. 1 *Wagn. Stat.* 394, §§ 26, 28; *Dixon v. Hannibal, &c. R. R. Co.*, 31 *Mo.* 409.

It seems to me, upon a fair construction of the statute, that a corporation is a resident of the county through which its line of road passes, and in which it has an agent upon whom process can be served, and where suits are authorized to be commenced. It is true, upon this question there have been contradictory decisions.

In Vermont the court holds that the residence of a railway company, for the purpose of bringing actions, is the county or town upon the line of their road, where their principal office and the center of their business operations are situated. *Railroad Company v. Cooper*, 30 *Vt.* 476. So in New Jersey it is held, that in a suit brought against a corporation, the venue should be laid in the county where their principal office is located; that being considered their place of residence, and that the rule applies to railroad companies, where their road runs through and their franchises are exercised in different counties. *Thorn v. Central R R. Co.*, *N. J. L.* (2 *Dutch.*) 121.

But in the case of the *City of St. Louis v. Wiggins Ferry Co.*, 40 *Mo.* 586, this court declared that there can be no doubt that, within the limits of the state

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which grants the charter, a corporation may have a special constructive residence, in more places than one, so as to be subjected to the local jurisdiction where its officers and agencies are actually present in the exercise of its franchises, and in carrying on its business; and that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done. *Glaize v. South Carolina R. R. Co.*, 1 *Strob. (S. C.)* 70; *Cromwell v. Insurance Co.*, 2 *Rich. (S. C.)* 512.

In *Bristol v. Chicago, &c. R. R. Co.*, 15 *Ill.* 436, it was decided that a corporation has its residence where it exercises corporate functions; where its business is done; where its franchises are exercised; where it is engaged in the prosecution of the corporate enterprise, or in any county in which it operates the road.

This doctrine was quoted with approval, followed, and affirmed in *Baldwin v. Mississippi R. R. Co.*, 5 *Iowa*, 518, and in *Richardson v. Burlington, &c. R. R. Co.*, 8 *Id.* 260.

In *U. S. Bank v. Devaux*, 5 *Cranch*, 84, it is said of a corporation, "this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it."

Although in the present case the principal office of the defendant was situated in St. Louis county, still it was as much engaged in prosecuting the enterprise for which it was brought into being and in transacting its general business in the county of Laclede, as it was in the county of St. Louis.

The road was operated and the corporate franchises exercised in every county through which it ran. Under the provisions of the statute, then, for the purpose of being sued, I think it had a local *situs* and residence,

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and that it was entitled to no greater privileges than an actual resident of the county. Wherefore, the judgment will be affirmed.

All concurred.

Judgment affirmed.

THE STATE OF MISSOURI v. THE HANNIBAL
& ST. JOSEPH RAILROAD COMPANY.

51 *Missouri*, 532.

Supreme Court of Missouri; February Term, 1873.

Actions. Penalties. Service of process. A suit against a railway company, for a penalty imposed by statute for failing to give the signals required, may be commenced by service of the process upon a station agent of the company, if that mode of service is proper in ordinary cases, although the statute provides that such suits "may be commenced by serving the summons on any director of such company." The word "may" is permissive and additional as to the common mode of service, not mandatory or exclusive of other methods.

Error from the supreme court of Missouri to the circuit court of Clinton county.

This was an action for a penalty for the failure of the defendant to give signals of the approach of its train to the crossing of a highway. The action was dismissed, on the ground that there was no sufficient service of the summons; and to review this decision the plaintiff brought a writ of error.

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J. G. Woods, and T. B. Dunn, for the plaintiff in error.

Hall & Oliver, and Carr, for the defendant in error.

ADAMS, J.—This was a suit brought before a justice of the peace, under the statute, against defendant for the penalty allowed against the defendant for failing to ring a bell or sound a whistle before its train reached a road crossing.

The service of the summons was on a station agent. The defendant failed to appear, and the justice rendered judgment by default for the penalty, twenty dollars. The defendant in due time filed a motion to set aside the judgment, for the reason that there had been no sufficient service of the summons. The justice overruled the motion, and defendant appealed to the circuit court. In that court the defendant filed a motion to dismiss the suit, because there was no sufficient service of the summons. The court sustained this motion, and dismissed the suit. Plaintiff excepted, and has brought the case here by writ of error.

The only question here, is the proper construction of section 42, ch 63, 1 *Wagn. Stat.* 310, which reads: "SEC. 42. All penalties imposed upon railroad companies by this chapter, may be sued for in the name of the state of Missouri; and if such penalty be for a sum not exceeding one hundred dollars, then such suit may be commenced before a justice of the peace, and may be commenced by serving the summons on any director of such company."

The question is, whether the mode of serving the summons, as indicated by this section, is merely permissive, or absolutely mandatory. It is conceded that in ordinary cases the service on the station agent would have been proper, under section 26, 1 *Wagn. Stat.* 294;

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but it is contended that, inasmuch as this suit is for a penalty, the word *may*, as used in connection with the service of the summons, is restrictive, and no other mode is allowed than the one pointed out by this section. It strikes me that such a construction is too narrow to meet the end the legislature had in view. The object was to punish the company for a neglect of duty, and to facilitate this object, an additional mode of serving the writ is provided. The word *may*, when it concerns the public interests, or the rights of third persons, very often must be construed as meaning shall, and hence that word, as used in the same section in regard to bringing the suit in the name of the state, before a justice of the peace, ought to be considered as imperative, and as used in the sense of the word shall. But there would be no interests of the state or third persons advanced by restricting the service in this case to a director. The simple object of such service is to bring the defendant before the court, and there can be no peculiar reason why a director rather than any other agent should have been selected as the only person on whom the writ could be served.

In my judgment, the word *may*, as used in this section, in regard to the service of the writ on a director, is permissive and additional, and not restrictive or mandatory.

All concurred.

Judgment reversed, and cause remanded.

McCOUN v. THE NEW YORK CENTRAL AND
HUDSON RIVER RAILROAD COMPANY.

50 *New York*, 176

*Court of Appeals of New York; November Term,
1872.*

Penalties. Actions. An action against a railroad company to recover a penalty, under the statute of New York to prevent extortion by railroad companies, *Laws* 1857, ch. 185, is not "an action arising on contract, for the recovery of money only," within the meaning of section 129 of the New York Code of Procedure, prescribing the form of the summons; and the summons in such an action should, therefore, not contain a notice that on failure of the defendant to answer, the plaintiff will take judgment for a specified sum, but a notice that the plaintiff will apply to the court for the relief demanded.

Appeal. But although in such an action the notice contained in the summons is in the former instead of the latter form, an order denying a motion to set aside a summons and complaint for such defect in the summons, does not affect a substantial right, and is, therefore, not appealable to the court of appeals of New York. *So held*, where the summons and complaint were served together upon the defendant.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover from the defendant a penalty, under the New York act to prevent extortion by railroad companies. *Laws* 1857, ch. 185. The summons was in the form prescribed by the New York Code of Procedure, § 129, subd. 1, for actions "arising upon contract, for the payment of money only." The summons and complaint were served together.

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The defendant moved at special term to set aside the summons and complaint, but the motion was denied. The defendant appealed to the general term, which affirmed the order of the special term; and from this decision the defendant appealed to the court of appeals.

A. P. Laning, for the appellant.

Thomas M. Webster, for the respondent.

ALLEN, J.—The order in this and several hundred other actions now before us, and depending upon the result of this appeal, is not appealable. Only such orders arising upon any interlocutory proceedings, or upon any question of practice, are appealable, as affect a substantial right, and do not involve any question of discretion. *Code*, § 11, subd. 4. A departure from the Code in any particular, in the progress of an action, does not necessarily affect a substantial right. A strict and literal compliance with a statutory regulation is not necessarily of the substance of the remedy, or substantial in its character. Whatever is a question of practice is of the same character, whether it arises under a positive statute, an express rule of the court, or the settled usages and law of procedure. Under either, a substantial right may be affected, and the questions may be such as to exclude the exercise of any discretion, but these are exceptional cases. Most of the provisions of the Code are modal, and intended for the regulation of the formal procedure in the action, and are no more sacred than any other rules of practice. The Code recognizes this: 1st. By directing that any defect or error in the pleadings or proceedings which do not affect the substantial right of the adverse party, shall be disregarded in every stage of the action. *Code*, § 176; and 2nd. By giving the largest liberty to the court in its discretion, either before or after judg-

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ment, to amend any pleading, process, or proceeding, by correcting a mistake in any respect. *Code*, § 173. If a literal adherence to the Code, and its forms and requirements, had been deemed a substantive right, and essential in every case, these two sections would not have been enacted. It is necessarily wholly immaterial, and can not, in the nature of things, affect a substantial right of the defendant, whether a summons is under the first or second subdivision of section 129, when a copy of the complaint, as was in all the cases before us except six, is served with the summons. The office of the summons is to bring the defendant into court, to give the court jurisdiction of the person. The process, and its particular form, are prescribed by sections 127 and 128 of the Code. Civil actions must be commenced by the service of summons, which shall be subscribed by an attorney, and directed to the defendant, and shall require him to answer the complaint within twenty days after the service of the summons. This is the effective process to subject the defendant to the jurisdiction of the court. The subsequent section, 129, directs the insertion of a notice in the summons, in actions on contract for the recovery of money only, that judgment will be taken for a specified sum, on failure of the defendant to answer, and in other actions, that application will be made to the court for the relief demanded. The statute permits the commencement of an action, by the service of a summons without a complaint. *Code*, § 130. The purpose of the notice required by section 129 is to inform the defendant of the character of the action and the consequences of a default, that he may understandingly determine whether the protection and preservation of his rights call for an appearance and answer. But if the complaint is served with the summons, the defendant has more full and perfect knowledge of the cause of action and the consequences of a default than he

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could get from the summons alone, and if there is an error or defect in the summons, it carries with it the remedy and correction, and an effectual preventive against error by any one. The objection is, that the notice is that the plaintiff will take judgment for a specified sum, instead of notice of an application to the court for the relief demanded, or *vice versa*. It would be trifling with the rights of suitors, sacrificing substance to the merest form, to hold that the denial of a motion to set aside the summons and complaint under such circumstances affected a substantial right of the defendant, and that he was or could be prejudiced by the particular form of the notice. Upon the merits, so far as it can be said to have merits, the motion was frivolous. The service of the summons with the notice in the form challenged, if no proceedings could regularly be taken under it, could affect no one. Conceding that the summons and notice were a nullity until some action was taken, they injured no one. *Non constat* that the plaintiff would ever take any proceedings or undertake to obtain a judgment upon the service. A mere notice can not be set aside. A defect like this is no cause for setting aside the summons. The defendant must wait till some action or proceeding is had under it. *McNamara on Nullities*, 182, 183, and cases cited. But for the reasons first assigned, I am for a dismissal of the appeals. The question whether a party in court, by the regular service of a summons, irregular it may be in form, shall litigate in that suit or upon the service of another summons, slightly different in form, when he has not been misled, and does not lose the benefit of any defense he may have had, and when the defenses in the two actions must be precisely the same, does not affect any substantial right. *Barder v. Covill*, 4 *Cow.* (N. Y.) 60. Upon the question actually decided by the court below, I am of the opinion that that court erred in holding the

• summons to have been regularly issued under the first subdivision of section 129 of the Code. The actions within that subdivision must "arise on contract and be for the recovery of money only." This action is for the recovery of money only, and in that respect is within the provisions of the subdivision, but is not upon contract. That term was used in its ordinary and proper sense. A contract is a drawing together of minds until they meet and an agreement is made to do or not to do some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the result of the ordinary and universal experience of mankind. If A borrows money of B, the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise, proved by circumstantial evidence. It is quite distinct from that fiction by which a statute liability has been deemed sufficient to sustain an action of assumpsit, upon the ground that a party subjecting himself to the penalty or other liability imposed by statute, has promised to pay it. That feature does not suppose a contract, but simply a promise *ex parte*. In this view, every man promises not to trespass on his neighbor's property, or to commit an assault upon his person, and an action of assumpsit might be brought and summons issued under the first subdivision of section 129, for a breach of this implied contract to observe the laws. The Code was not dealing with a legal fiction in prescribing a form of summons in actions arising on contract. A statute liability wants all the elements of a contract, consideration and mutuality, as well as the assent of the party. Even a judgment founded upon contract is no contract, for *judicium redditur in invitum*. Bidleson v. Whytel, 3 Bur. 1545; Wyman v. Mitchell, 1 Cow. (N. Y.) 316. The plaintiff doubtless erred in making

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his summons as in an action upon contract, but as the mistake was cured by serving with it a copy of the complaint, the order of the court below should be affirmed, if the appeal is not dismissed. I am for a dismissal of the appeal. Such a disposal of this appeal disposes of over five hundred appeals by this defendant from orders made refusing applications to set aside the summons and complaint, because the notice inserted in the summons was not under the right subdivision of section 129, the plaintiffs being different, but the attorneys, in many of the cases, the same.

But one bill of costs should have been allowed by the court below in granting or refusing the motions made at the same time upon the same or similar papers, and which might have been made on one set of papers, entitled in the different actions, and where the attorneys were the same. *Jackson v. Keller*, 18 *Johns. (N. Y.)* 310; *Same v. Garnsey*, 3 *Cow. (N. Y.)* 385; *Jerome v. Boeram*, 1 *Wend. (N. Y.)* 293; *Schermerhorn v. Noble*, 1 *Den. (N. Y.)* 682; *Post v. Jenkins*, 2 *How. (N. Y.) Pr.* 33; *Cortland County, &c. Ins. Co. v. Lathrop*, *Id.* 146. The appeal should be dismissed, with costs, upon the principle settled by these cases.

PECKHAM, J.—Should the summons in this case have been issued under the first or second subdivision of section 129 of the Code? The first provides for “an action arising on contract, for the recovery of money only;” the second for “other actions.” Is this “an action arising on contract?” It is an action for a penalty for violating a statute. It is claimed to arise on contract, upon the principle stated in 3 *Black. Com.* 161, whereby a forfeiture imposed by the by-laws of a corporation upon any that belong to the body, immediately creates a debt, for which an action of debt will lie by the party injured. This principle is declared by BLACKSTONE to be “an implied, original contract to

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submit to the rule of the community whereof we are members." He then adds that the same reason may, with equal justice, be applied to all penal statutes.

This principle, if carried out by the same reasoning, would abolish all actions of tort. The implied original contract to obey all statutes, by the same principle and the same reasoning, extends to all laws, whether statutory or common law. It is surely not confined to the obeying of all statute law simply. Thus assumpsit, if not debt, would lie for an assault and battery, or for arson, &c.

I incline to think that this provision of the Code had no reference to this fiction of the law of an implied original contract to obey the laws of the land by each member of the community. But it meant what it plainly says.

In section 53 of the Code, "an action for a penalty" is stated as impliedly different from an action on contract for the payment of money, and a justice of the peace is expressly given jurisdiction of both. The Code thus recognizes the difference between actions upon contract and an action for a penalty.

It is not enough that the recovery is to be for "money only," but the action must arise on contract also, to bring the case under the first subdivision.

I think it plain that this action does not arise on contract.

Is this order appealable?

To be appealable, it must be "an order affecting a substantial right, not involving any question of discretion." *Code*, § 11, subd. 4.

It seems to me that the opinion of the supreme court is right, that this order is not appealable.

It is difficult to perceive the "substantial right" involved in this order.

The defendant made the motion and brings the appeal. What benefit to the company, if this summons

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had been under the second instead of under the first subdivision? If the complaint were sworn to and it is an action on contract for the payment of money only, under the first subdivision, the plaintiff may take judgment before the clerk without proof for the amount claimed in the summons. If not sworn to, the clerk takes proof of the claim, except upon instruments for the payment of money only; upon such instruments, he assesses the amount due upon the simple production before him. *Code*, § 246, as amended in 1858.

If the summons erroneously issued under the first subdivision compelled the assessment by the clerk instead of the judge, it might be urged, at least with plausibility, that the defendant was deprived of a substantial right—that he had a right to a judge instead of a clerk to adjudge his rights. But it will be observed that the summons has no control as to the officer before whom the judgment shall be taken, whether clerk or judge. The Code declares that the clerk shall assess only in actions arising on contract for the payment of money only, not that he shall assess in cases where the summons has issued under the first subdivision—if erroneously so issued. So that the statement in the summons has no effect as to the officer before whom the assessment is to be made. It is no evidence of the nature of the action. The clerk would have no right to assess damages upon default in an action for an assault and battery, though it was commenced by summons, under the first subdivision.

So that if the defendant suffer a default upon this summons, he loses nothing. If he appear and take issue, the case is tried before another tribunal.

The only effect the summons can possibly have, when issued under the first subdivision, is to limit the amount of recovery to the sum claimed therein in case of defendant's non-appearance; certainly he could

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take no more than that sum if his complaint be sworn to. § 246.

This, so far as it goes, is a benefit to defendant, viz: that he may rely that the plaintiff will take judgment only for a specified sum if defendant does not appear.

I do not perceive that the defendant can sustain any injury by this mistake. If he can not, I do not think the order involves a substantial right.

The chief purpose of this summons is to get the defendant into court. Where the complaint is served at the same time, showing the cause of action and the amount claimed, the summons would seem to be of not the least value, though its formal issue may be required.

In my opinion, no substantial right is involved in this order—no possible loss can be sustained by the defendant by its issue under the first instead of the second subdivision.

Besides, the court had power to amend it, if there were any reason for so doing, and was bound to disregard it by the Code.

The only benefit of this provision as to the different kinds of summons seems to be to enable parties to litigate the question by motions sometimes extremely difficult to determine, whether the summons is not under the wrong subdivision. It does not touch the merits or progress of the action in any way. It is a harmless contest, as it can injure no one. It no more involves a substantial right than would the question whether the summons was written in red or black ink. That inquiry is just as substantial to the rights of the parties. Did the legislature ever intend that an appellate court should consider such questions?

The appeal should be dismissed.

For dismissal of appeal, CHURCH, Ch. J., ALLEN,

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PECKHAM, and RAPALLO, JJ., concurred; RAPALLO, J., concurring upon authority of section 176 of the Code.

GROVER and FOLGER, JJ., dissented.

Appeal dismissed.

THE CHICAGO & ALTON RAILROAD COMPANY v. ADLER.

56 *Illinois*, 344.

Supreme Court of Illinois; September Term, 1870.

Penalties. Jury. Trial. In an action against a railway company, to recover penalties imposed by statute for neglecting to give signals prescribed, a jurymen who, being asked on his examination which way he would incline to find if the evidence were evenly balanced, answers that he would lean against the defendant, is incompetent.

Penalties. Evidence. A witness, on the trial of an action against a railway company to recover penalties for numerous omissions to give the signals required by law, may use, to refresh his memory, a copy of an original memorandum of such omissions. That he uses the copy instead of the original, is an objection which goes to the credit but not to the competency of his testimony. But before the witness can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that the copy is truly transcribed from the original, and that the original was correctly made, and was true when it was made.

Penalties. Where a penalty is imposed by statute for the failure of a railway company to give certain signals before its train crosses a public highway, the plaintiff in an action to recover such penalty must allege and prove that a highway existed at the point where the failure to give the proper signal is alleged to have occurred.

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But evidence that there was at such a point a road used by the public, and recognized and repaired, when necessary, by the highway officers, is *prima facie* evidence of the existence of a highway.

Penalties. Pleading. The declaration in an action against a railway company, to recover penalties for its omissions to give signals of the approach of its trains, need not set forth the particular trains failing to give the signals. Neither are the numbers or descriptions of the engines of such trains material.

Penalties. Where a statute imposing a penalty of fifty dollars upon every railway company, for each failure to give certain signals of the approach of its trains to a highway crossing (*Ill. Act, Nov. 5, 1849, § 138*), is amended by an act which provides that in pending suits the penalty recoverable for each offense shall be not exceeding one hundred dollars, instead of fifty dollars, (*Ill. Act, Feb. 27, 1869*), although it may be the legislature had not power to increase the penalty after the omission had occurred, yet, as to pending suits, the provision operates as a repeal of the former penalty, and allows it to be fixed at any amount not more than fifty dollars.

The prosecutor in a *qui tam* action for such a penalty has no vested right in the penalty until he has reduced his claim to a judgment.

Appeal to the supreme court of Illinois from the circuit court of Will county.

This was an action to recover penalties imposed by statute for the omission by the defendant to give the signals required by the law of the approach of its trains to a highway crossing. The action was brought under the Illinois act of November 5, 1849, § 138. The questions arising in the case are stated in the opinion. The jury found a verdict for the plaintiff, and from the judgment entered thereon, the defendant appealed.

, J.—It is first urged, that the court below erred in refusing to allow the peremptory challenges of jurors made by appellants. Four of the jurors who tried the case were asked on their *voir dire* if the evidence were evenly balanced, which way they

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would incline to find, and each answered that he would, in such case, lean against the defendants, and one of them stated he would do so, because the company were able to stand it, and he thought a private individual should "have a little mite the advantage."

It is a fundamental principle, that every litigant has the right to be tried by an impartial and disinterested tribunal. Bias or prejudice has always been regarded as rendering jurymen incompetent. And when a juror avows that one litigant should have any other than the advantage which the law and evidence give him, he declares his incompetency to decide the case. He thereby proclaims that he is so far partial as to be unable to do justice between litigants, or that he is so far uninformed, and his sense of right is so blunt, that he can not perceive justice, or, perceiving it, is unwilling to be governed by it.

The rule is so plain and manifest that the party claiming to recover must prove his cause of action, it is a matter of surprise that an adult can be found who would not know that such is the common sense as well as the common honesty of the rule. No ordinary business man would be willing that a claim pressed against him should be allowed, and he be compelled to pay it, when the evidence for and against the claim was evenly balanced. And how such men can bring themselves to apply a different rule, as jurors, to the rights of others, is incompatible with the principles of justice. Nor does the fact that jurors, who avow, under oath, that they would incline to favor a recovery by the plaintiff on evidence evenly balanced, declare that they are impartial, in the slightest degree tend to prove their impartiality. Their statement only tends to prove that they are so far lost to a sense of justice, that they regard what all right-thinking men know to be wrong, as just and impartial. To try a cause by

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such a jury is to authorize men who state that they will lean, in their finding, against one of the parties, unjustly to determine the rights of others, and it would be no difficult task to predict, even before the evidence was heard, the verdict that would be rendered. Nor can it be said that instructions from the court would correct the bias of jurors who swear that they incline in favor of one of the litigants. In suits for the recovery of penalties, the law does not warrant a recovery, unless the proof clearly preponderates in favor of the plaintiff. And to admit jurymen who avow that they will not even require a preponderance, would be to violate the rule. The objection was well taken to the jurors, and the court erred in permitting them to act on the trial below.

Appellants asked, but the court refused to give, this instruction: "If the jury believe, from the evidence, that the witness, Jasper Adler, testified from a written memorandum which he held before him, and shall further believe, from the evidence, that said memorandum was a copy made the day previous, of another memorandum made about two years previously, then the jury are instructed that they will disregard so much of witness's testimony as depends on said copy."

It has been held by this court that a witness may use a memorandum to refresh his memory. *Dunlap v. Berry*, 4 *Scam. (Ill.)* 372. But while the witness may use the memorandum to refresh his memory, he must be able to state that he remembers the facts. If he has no recollection of the circumstances, and can only say they are true because he finds them on his memorandum, it would not be proper to permit the witness to either read or speak from the memorandum. If, in this case, the witness could say that he remembered the omissions to ring the bell or to sound the whistle, no objection is perceived in permitting him to refer to his paper to ascertain the several dates, provided he

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can say that he knows them to be true, because they were true when made, and were noted at the time. But the witness must be able to say the facts thus noted are true. And the witness may use a copy of the original memorandum, but, unless he can give satisfactory reasons for using the copy, that fact might impair the weight of his evidence with the jury. That fact would go to the credit, and not to the competency, of his testimony. But, before he can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that it is truly transcribed from the original, and that the original was correctly made, and was true when it was made.

It is next objected that the court erred in refusing to give the sixth of appellants' instructions. It is this: "Unless the plaintiff has proved that the said railroad crossed a highway, as alleged in said declaration, the plaintiff can not recover in this case, and the jury will find for the defendants."

This instruction was proper, and should have been given. The gist of the action was the failure to ring a bell or sound a whistle at the crossing of a public highway. Appellee had averred in his declaration that there was a public highway, and that appellants had run their engines and trains over it without giving the signals required by the statute, and he was bound to prove that a highway existed at that point. To do so, however, he could adduce evidence that there was a road there, used by the public, and recognized and repaired by the officers having charge of highways, so far as repairs were needed. This would, *prima facie*, prove its existence. And, if appellee desired it, he should have asked an instruction informing the jury as to the effect of such evidence, and thus prevented all possibility of its misleading the jury. Containing a correct legal proposition, applicable to the evidence, it should have been given.

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It is next urged as ground of reversal that the court misdirected the jury by appellee's instructions. By them the jury are informed that, if the plaintiff had proved his case, they should find for him fifty dollars on each count in the declaration. Under the act of 1849, these instructions would no doubt have been correct, but the act of February 27, 1869, session laws, 308, has, by amendment, made a material change in the law giving such penalties. This act declares that the penalty shall be in a sum not exceeding one hundred dollars for each neglect to ring the bell or sound the whistle. Thus it is perceived that the penalty of fifty dollars for each omission, given by the act of 1849, is changed to a discretionary power to give any sum not exceeding one hundred dollars for each omission.

The second section of the act declares that it shall not apply to suits then pending under the act of 1849, "except that the penalty recoverable in such suits shall be not exceeding one hundred dollars, instead of fifty dollars as therein provided." This provision operates on the penalty sued for in this case, so far as to repeal the penalty of fifty dollars, and to give a discretion in its imposition. Under this last section the jury, had they been properly instructed, might have given but a nominal penalty. Although it may be the legislature had no power to increase the penalty after the omission had occurred, they have seen proper to give the power to decrease the amount below the fifty dollars given by the act of 1849. And, in view of this statute, the instructions given for appellee were clearly erroneous.

It will be conceded by all, that a person suing *quidam* has no vested title in a penalty until he, by a recovery, reduces the claim to a judgment. In the case of *Parmelee v. Lawrence*, 48 Ill. 331, it was said, that it has never been understood that parties, by their contracts, acquire a vested right to existing penalties. And in the case of *Coles v. Madison County*, *Breese*

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(*Ill.*), 120, it was held, that the legislature might remit a penalty even after verdict and before judgment. It was there said that a party acquired no vested right to a penalty by suing *qui tam*, but only thereby prevented any other person from suing for the same penalty. BLACKSTONE, in his commentaries, vol. 2, p. 442, says, "But there is also a species of property to which a man has not any claim or title whatever, till after suit commenced and judgment obtained in a court of law, when before judgment had, no one can say he has any absolute property, either in possession or in action; of this kind, are first, such penalties as are given by particular statutes, to be recovered in an action popular." This is the general rule and is of frequent application, and, so far as we are aware, it has no exception. This, then, rendered the instructions for appellee erroneous, and they should not have been given.

We perceive no force in the objection that the declaration does not specify the train whose engineer was guilty of a violation of the statute. To require such particularity would render prosecutions of this character exceedingly difficult, and almost operate as a repeal of the statute. And it is believed to be a degree of particularity not required in any pleadings, either at law or in equity. It might be urged with equal force that the defendant's cattle, horses, or other stock that have committed a trespass, should be identified and described in the declaration.

Nor was proof of the numbers or description of the engines drawing the trains, omitting to give the signals, material to a right to recover. The judgment of the court below, for the errors indicated, must be reversed and the cause remanded.

Judgment reversed.

Wilson v. Ohio, &c. R. R. Co.

WILSON v. THE OHIO & MISSISSIPPI RAIL-
ROAD COMPANY.*Illinois.**Supreme Court of Illinois; 1873.*

Penalties. When a statute imposing a penalty of fifty dollars on every railway company for each failure to give certain signals of the approach of its trains to a highway crossing (*Ill. Act*, Nov. 5, 1849, § 138), is amended by an act which provides that in pending suits the penalty recoverable for each offense shall be not exceeding one hundred dollars, instead of fifty dollars (*Ill. Act*, Feb. 27, 1869), the amendatory act repeals the former penalty, and allows it to be fixed at any amount not more than fifty dollars. .

The prosecutor in a *qui tam* action for such a penalty has no vested right in the penalty until he has reduced his claim to a judgment. A higher penalty than fifty dollars can not be imposed for offenses committed before the passage of the amendatory act. Such a construction of that act would make it an *ex post facto* law.

Appeal to the supreme court of Illinois from the circuit court of Marion county.

This was an action of similar nature to the preceding case, and the questions involved were of kindred character. Judgment was rendered for the defendant; and from the judgment the plaintiff appealed.

B. B. Smith, for the appellant.

LAWRENCE, J.—The railroad act of 1849 imposed a penalty of fifty dollars on every railway company whose trains failed to ring a bell or sound a whistle as required by the act. The penalty was recoverable in a *qui tam* action, one-half going to the prosecutor, and was to be imposed for each offense. In 1869 this act

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was amended, the penalty being left discretionary, except that it was not to exceed one hundred dollars for each offense. The amendatory act provides that it shall not apply to pending suits, except as to the change in the penalty, which is equivalent to saying, to that extent it shall apply to them.

This was a suit brought before the latter law was passed. The declaration contains eleven hundred and fifteen counts, and claims the penalty of fifty dollars under each count. The question is raised by the pleadings as to whether the right to maintain this action is taken away by the passage of the amendatory act. The circuit court held the action could not be maintained.

It is urged, on behalf of the appellee, that the new act imposes the penalty upon the engineer or fireman, and not upon the company. We have not the slightest idea the legislature intended such a construction should be given to the act, nor do we think its language will reasonably bear it. It does not propose to repeal the old law, but only to amend it. It provides by whom the bell shall be rung or whistle sounded, to wit, by the engineer or fireman; but these are mere words of surplusage, as no court would hold that if the bell were rung or the whistle sounded by a third person, who should happen to be on the locomotive, the company would be liable to the penalty. The act also leaves out the words "to be paid by the corporation." But if the corporation is not to be liable to the penalty, who is to be? Surely not the engineer or fireman, because the old act did not make them so, and this does not. If the legislature had so intended, it would have determined to which of them the duty belonged, and would have made him responsible. Neither of them should be made liable for the neglect of the other, because neither is the servant of the other. But the company may be made liable for both, because both are its servants. Perhaps, this act was drawn by some ingenious

person with the expectation that, by its adoption, the legislature, while supposing they were only making a very proper change in the penalty, would really exonerate the railway companies altogether. But if the author of the act had that in view, the intent should have been more plainly expressed; in which event, however, the legislature would probably not have passed the law. The legislature intended to keep in force the old police regulation with a difference of penalty, and this regulation would be practically worthless if intended to operate only on the fireman and engineer. The old and new act are in *pari materia*, and must be construed together. The old law said the companies should be liable, and this does not contain a word showing an intent to relieve them from their liability. The old act did not in terms say the bell should be rung or whistle sounded by the engineer or fireman, but the duty devolved upon them as much under the old law as under the new, because the companies have no other servants upon the train by whom the duty can be performed. The new act is to be construed as amending the old merely by changing the penalty, and fixing a three months' limitation as to time, but leaving the penalty to rest where it did before. If the legislature had intended to transfer it from the company to one of two servants, it is simply incredible that it would not have done so in terms, and have declared which servant was to be responsible.

What, then, is the effect of the new law upon suits pending at the time of its enactment? Simply this. The former certain penalty of fifty dollars is taken away, and it may be fixed at any amount not exceeding fifty dollars for each offense. A higher penalty can not be imposed for offenses committed before the passage of the act, as such a construction would make the law *ex post facto* in its character. On the other hand, the prosecutor has no vested right in the penalty

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of fifty dollars, as the law recognizes no vested right in a penalty.

The object of the amendment undoubtedly was to prevent the recovery from railway companies of a great sum of money by a prosecution instituted as a private speculation, for a large number of violations of the law at a fixed penalty which the court could not vary. In this case, if all the counts should be sustained by the proof, the aggregate of the penalties under the old law would amount to fifty-five thousand seven hundred and fifty dollars, one-half of which would go to the prosecutor. The amendment was designed to prevent such results.

Judgment reversed.

LANDES v. THE PACIFIC RAILROAD COMPANY.

50 *Missouri*, 846.

Supreme Court of Missouri; July Term, 1872.

Carriers. Duty to transport goods. A receipt for goods, given by a railway company, in the usual form of a carrier's receipt, implies an agreement to transport the goods to their destination, if it is upon the line of the railway.

Carriers. Loss of goods. Right of action. Where goods received by a railway company, as a common carrier, for transportation, are lost, an action for damages can be maintained by the owner. The consignee has no right of action, except as owner of the goods.

Appeal to the supreme court of Missouri from the circuit court of Jackson county.

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This was an action to recover the value of a box of goods delivered by the plaintiff to the defendant, as a common carrier, for transportation, which was lost while in the defendant's charge. The questions presented are stated in the opinion. Judgment was rendered for the plaintiff; and the defendant appealed.

J. N. Litton, for the appellant.

H. B. Johnson, and *S. D. Twitchell*, for the respondent.

BLISS, J.—This suit was brought against defendant, as common carrier, for failing to deliver a box of goods shipped at Peoria, Illinois, with other goods, for Kansas City, Missouri, and plaintiff recovered judgment for the value of the contents.

Plaintiff offered the deposition of the freight agent of the Ohio & Mississippi Railroad, who testified that all the goods were delivered to the defendant at St. Louis, as by the following receipt, which he exhibited as the receipt of defendant:

“ST. LOUIS, January 30, 1866.

“Received from the St. Louis Transfer Company (carrier No. 14), warehouse corner of Second and Carr streets, in good order, on board the Pacific R. R.

Marks.	Articles.	Weight.
	3 chairs.	
W. F. McL.,	1 bbl.	
Kansas City.	1 cider.	1800.
	10 boxes.	

Charges \$25.40.

ROBINSON.”

The plaintiff testified to the shipment at Peoria, to the contents of the lost box, and their value; that they were his property; that all the other boxes and goods were delivered to him at Kansas City; that he de-

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manded the one in controversy, but the person who delivered the others told him it was missing.

In a motion for a nonsuit, and also when that was overruled, by instructions asked, defendant's counsel claimed :

1. That there was no evidence that the company ever received the goods, as the agency and handwriting of Robinson were not proved. The evidence showed that the freight agent of the Ohio and Mississippi Railroad, who was constantly doing business with defendant, described the receipt as that of the Missouri Pacific Railroad, and defendant's freight agent at Kansas City in effect acknowledged the receipt of the shipment, by delivering the other goods embraced in the same paper, and saying that the one sued for was missing.

2. That if the receipt is considered proved it is not a contract to carry, but a receipt simple. This paper is doubtless in the usual form, and implies an agreement to transport the goods to their destination if upon defendant's line. As common carrier only, it had no right to receive them for any other purpose.

3. That plaintiff was not the consignee, and it was not competent for him to demand them or sue for them. The consignee was not the owner of the goods, and had no right to sue for them. When the plaintiff demanded the lost box, it would have been a good excuse for not delivering it to him, if it had been delivered to the consignee. But no such excuse was given, but one, on the contrary, wholly inconsistent with such delivery. The defense is purely technical, and wholly without merit.

All concurred.

Judgment affirmed.

Tucker v. Pacific R. R. Co.

TUCKER v. THE PACIFIC RAILROAD COMPANY.

50 Missouri, 385.

Supreme Court of Missouri; July Term, 1872.

Carriers. Delay in transportation of goods. In an action against a railway company to recover damages resulting from its delay in transporting property actually received by it as a common carrier for transportation, the fact that the delay was caused by the defendant's lack of proper means of transportation is no defense.

Damages. The measure of damages in such a case is the difference between the price of the property at the time when it should have been delivered, and the time when it was actually delivered.

Error from the supreme court of Missouri to the circuit court for Cooper county.

This was an action to recover damages resulting from defendant's delay to transport and deliver several car loads of hogs, received by defendant as a common carrier, for transportation. The facts in the case, and the questions arising upon them, are stated in the opinion. The jury rendered a verdict for the plaintiff. A motion by the defendant to set aside the verdict was overruled, and judgment entered for the plaintiff. The defendant brought this writ of error to review the judgment.

George E. Leighton, for the plaintiff in error.

Draffin & Muir, for the defendant in error.

ADAMS, J.—This was an action on a contract of affreightment, whereby the defendant, at the town of

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Bunceton, received a quantity of hogs belonging to plaintiff on its cars, and agreed to deliver them at St. Louis in a reasonable time. The plaintiff gave evidence conducing to prove that the hogs were not delivered in due time, and that, if the hogs had been delivered in time, they would have brought more in the market by twenty cents on a hundred pounds than when actually delivered, and that by the delay the hogs had shrunk in weight.

The defendant offered to prove that the delay was owing to the fact that it had not on hand, at the place of shipment, a proper locomotive; that the one that was there was made to burn coal and they were using wood on it, and it would have set the cars on fire if used to move the hogs; and offered to prove that as soon as they could get a proper locomotive to the place, the hogs were moved and delivered at St. Louis. All this evidence, consisting of depositions and oral testimony, was rejected by the court.

The court then instructed the jury, at the instance of the plaintiff, to the effect that when the defendant made the contract and received the hogs, it was its duty to have ready the proper machinery, &c., to carry the hogs without unnecessary delay to the place of destination, and that the want of proper machinery was no excuse, and the court refused to give counter instructions asked by the defendant. The court also instructed that the measure of damages was the difference in the price of hogs when they ought to have been delivered and when they were actually delivered at the place of destination, and the shrinkage occasioned by the delay.

The jury found a verdict for the plaintiff, and the defendant filed a motion to set it aside, which was overruled.

I have examined this record with care, and can see no fault in any of the rulings of the circuit court. When a common carrier like this railroad company re-

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ceives freight on board of its cars to forward, it becomes its duty to send it without delay. It was its duty to look to its machinery, to see if it was in proper condition, before the reception of freight. After receiving the hogs on its cars, and agreeing to send them forward, it was too late to look after machinery. It was the duty of the company to have the necessary machinery in readiness before the reception of the hogs.

All concurred.

Judgment affirmed.

FAULKNER v. THE SOUTH PACIFIC RAIL-
ROAD COMPANY.

51 *Missouri*, 811.

Supreme Court of Missouri; January Term, 1873.

Carriers. Delay in transportation of goods. In an action against a railway company to recover damages resulting from its delay in transporting property actually received by it as a common carrier for transportation, the fact that the delay was caused by the defendant's lack of proper means of transportation is no defense.

So held, where, by reason of an unusual press of business, the rolling stock of the defendant was inadequate to transport, promptly, the accumulation of goods shipped.

Damages. The measure of damages in such a case is the difference between the price of the property at the time when it should have been delivered, and the time when it was actually delivered.

Appeal to the supreme court of Missouri from the circuit court of Laclede county.

This was an action of the same nature as the pre

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ceding case, arising out of similar facts, with some differences, which appear from the opinion. Judgment was rendered for the plaintiff; from which the defendant appealed.

James Baker, and J. N. Litton, for the appellant.

R. P. Bland, for the respondent.

ADAMS, J.—The plaintiff sued the defendant for damages growing out of the alleged breach of contract of affreightment from St. Louis to Lebanon, and from Arlington to Lebanon also, for goods sold and delivered, and upon an account for lost goods assigned to plaintiff.

The petition alleges that defendant is a corporation, and that it is a common carrier of goods and passengers from St. Louis to Lebanon. This allegation is not noticed by the answer, and it therefore, for the purpose of this case, must be taken as true, and this will dispose of the question of alleged partnership between the two railroads, as it makes no kind of difference whether the two railroads were partners or not. They nevertheless could make an arrangement whereby the South Pacific might become liable as a common carrier for shipments, &c., in connection with the Pacific Railroad Company from St. Louis to Lebanon, and as this allegation is not denied, the presumption is that this arrangement did exist.

The answer, after thus impliedly admitting the above allegation, denies all the other material allegations of plaintiffs' petition, and sets up as a counter-claim the sum of two hundred dollars, which had been paid by mistake to the plaintiffs. This two hundred dollars is also referred to in the petition, and deducted from the amount of damages claimed by the plaintiffs. The plaintiffs based their right to damages on the ground of

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delay in forwarding their goods to their places of destination, after they had been shipped or received by the defendants on board of their cars, and charged that the goods during this time declined in value; and the difference in value between when they ought to have been delivered, and when actually delivered, is the gravamen of their complaint as to these shipments. They also claim that some lumber shipped was never delivered, and claim that it was converted by the defendants.

The plaintiff introduced evidence tending to prove their case as laid in the petition, and conducing to show that there was a delay of several days in delivering the goods beyond a reasonable time for that purpose.

The defendants introduced evidence tending to show that at the time these goods were shipped, there was a large accumulation or rush of business of this character, which amounted to more than the rolling stock could carry, and that the delay grew out of this extraordinary rush of business; that they had sufficient rolling stock for the usual or ordinary transaction of the business of the road. The first point relied on by the appellants is, that the company was released from liability for the delay in the delivery of the goods by the extraordinary rush of business, which required more than the usual amount of rolling stock, &c. If this had been a mere offer to deliver goods for transportation, the company would have been justified in refusing to receive them, on the ground referred to. But the petition alleges an actual shipment, and this allegation is supported by the proof. Where goods are actually shipped, it is the duty of common carriers to send them forward without delay. After the reception of the goods it is too late to look to the rolling stock, &c. They must do this before the reception of the goods; and if there be an unusual influx of business beyond their capacity, they may decline an offer for

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shipment of goods without incurring any liability. This doctrine was maintained by this court in *Tucker v. Pacific R. R. Co.*, 50 *Mo.* 385; *ante*, 291; and we see no reason now to disturb this ruling.

The next point is in regard to the measure of damages. The question was also presented in *Tucker v. Pacific R. R. Co.*, by an instruction to the effect that the measure of damages was the difference in the price of goods between when they ought to have been delivered, and when they were actually received at the place of destination. This instruction was held to be correct, and it is substantially the same as those objected to on that subject in this case.

On the whole record, I think that the verdict and judgment were for the right party.

SHERWOOD, J., did not sit.

Others concurred.

Judgment affirmed.

THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY v. THE PEOPLE OF THE STATE
OF ILLINOIS, *ex rel.* HEMPSTEAD.

56 *Illinois*, 365.

Supreme Court of Illinois; September Term, 1870.

Carriers. Duty to deliver grain to elevator. The rule established by decisions in Illinois, that a railway company receiving grain for transportation, may be compelled to deliver such grain to any elevator which it has allowed to be connected by a switch with its own line, should not be extended to a case where, although tracks

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exist connecting the railway with a certain elevator, yet a delivery of grain to that elevator will cause great expense to the railway company, and great derangement of its general business, and where such connecting tracks have never been made a part of its line by use.

But where such connecting tracks are in part owned by the railway company, and are a direct continuation of its line, easy of access, and are used by the railway company to deliver grain to other elevators situated thereon, as well as to deliver other freight, such tracks are to be regarded as part of the line of railway, and grain consigned to such elevator, and received by the railway company for transportation, must be delivered thereto.

These principles applied, in a peculiar case, where different lines of railway, though owned by the same corporation, and having a common name, were substantially distinct roads, constructed under different charters; and where connecting tracks leading to a certain elevator had been laid and used for the convenience of two of such lines, but not of the third.

Where grain is consigned in bulk to a particular elevator on the line of a railroad, it is no sufficient excuse for the refusal of the company so to deliver it, that it can not do so without large additional expense, caused by the loss of the use of motive power, labor of servants, and loss of use of cars while they are being delivered and unloaded at such elevator, and brought back. It is for that expense that freight is paid to the company.

Nor is the fact that a railway company has entered into contracts with the owners of other elevators at the same point, for exclusive delivery of grain to them to the extent of their capacity, a valid excuse, as against one not a party to such contracts, for refusing to deliver grain to an elevator upon the line of its road, to which such grain is consigned. Railway companies can not be released from the duties which, as common carriers, they owe to the public, except by the consent of every person who may call upon them to perform such duties. Among these is the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms.

Nor can a railway company refuse to receive and deliver grain in bulk consigned to a particular elevator on its line of road, on the ground that, as a common carrier, it is bound to carry and deliver only according to the custom and usage of its business, as established by itself, and that, never having held itself out as a carrier of grain in bulk, except upon the condition that it might itself choose the consignee, this has become the custom and usage of its

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business. A railway company can establish no custom inconsistent with the spirit and object of its charter.

Carriers. Duty to deliver goods. Mandamus. To compel a railway company to deliver to a particular elevator grain in bulk consigned thereto upon the line of its road, the writ of mandamus is proper, there being no other adequate remedy.

Appeal to the supreme court of Illinois from the superior court of the city of Chicago.

This was an application for a mandamus to compel the Chicago & Northwestern Railway Company to deliver to the elevator owned by the relators, grain in bulk consigned to their elevator from points upon the line of that road. The facts in the case and the questions presented are fully stated in the opinion. To the return made to the alternative writ a demurrer was put in, and upon the demurrer judgment *pro forma* was entered for a peremptory mandamus; from which judgment the railway company appealed.

James H. Howe, for the appellant.

The relations between common carriers and those who employ them, are those of contract, either expressed or implied from their acts. *Angell on Carriers*, 64; *Noyes v. Railroad Co.*, 27 *Vt.* 110; *Hales v. L. N. W. R. Co.*, 4 *Bests.* (66 *Eng. Com. L.* 116); *Johnson v. M. R. R. Co.*, 4 *Exc.* 367; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 344; *M. C. R. Co. v. Read*, 37 *Ill.* 484; *Western Transp. Co. v. Newhall*, 24 *Id.* 466.

The law imposes what it calls a "duty" upon common carriers, but this duty arises only from contracts the carrier makes, or from the agreements he holds himself out to the world as ready to make. This court, in the case of the *Western Transportation Co. v. Newhall*, 24 *Ill.* 468, define this duty very clearly.

The duty of a common carrier to deliver, in the

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absence of an express contract, in accordance with the usage and course of his business, was very fully considered by the supreme court of Vermont, in the case of Farmers' &c., Bank v. Transportation Co., 23 *Vt.* 186. See, also, Richards v. Michigan Southern, &c. R. R. Co., 20 *Ill.* 40; Porter v. Chicago, &c. R. R. Co., *Id.* 407; 2 *Redf. on Railways*, § 51; Thomas v. Railroad, 10 *Metc. (Mass.)* 472; Moses v. Railroad, 32 *N. H.* 523; Norwood Plains Co. v. Railroad, 1 *Gray (Mass.)* 263.

It is submitted to the court that these cases, with many similar ones that might be cited, establish, beyond cavil, these propositions :

1. That the relations existing between common carriers and those who employ them are founded upon contracts.

2. That a carrier has the right to establish his own course and manner of doing his business, and that when established the law imposes a duty upon him to do business for all who seek to employ him, to the extent of his capacity, in the course and manner which he has adopted.

3. That he can make express contracts with persons, changing his usual and ordinary mode of doing business, either by enlarging or restricting his responsibilities.

4. That the usual and ordinary methods of business of a common carrier by railroad, only impose upon it the duty of delivering property at its own depot.

5. That an action will lie against a carrier for refusing to receive and transport property, having the ability to do it, within the scope of its usual and ordinary business, but that such action will not lie for a refusal to receive and transport in a manner different from that usual and ordinary course of business.

Mandamus is not the proper remedy. 3 *Stephen's*

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N. P. 2291; *Moses on Mandamus*, 18; *Lamar v. Marshall*, 21 *Ala.* 772; *Fears v. Munn*, 2 *N. J.* 161; *Roberts v. Addsed*, 16 *Pet.* 216; *Ex parte Davenport*, 6 *Id.* 661; *Gray v. Bridge*, 11 *Id.* 189; *Ex parte Bailey*, 2 *Cow. (N. Y.)*, 479; *Ex parte Bacon*, 6 *Id.* 392; *People v. Contract Board*, 27 *N. Y.* 378; *People v. Canal Boat*, 13 *Barb. (N. Y.)* 432.

Goudy & Chandler, for the appellee.

It is the legal duty of the appellant to do the acts commanded by the alternative writ, both by the common law and statute. *Vincent v. Chicago, &c. R. R. Co.*, 49 *Ill.* 33; *Laws* 1867, 181, § 22. The appellant is a common carrier, and as such must carry for all, and all goods, without discrimination. *Chicago, &c., Railroad v. Thompson*, 19 *Ill.* 584; *Illinois Central Railroad v. Morrison*, *Id.* 139; *Western Transp. Co. v. Newhall*, 24 *Ill.* 466; *Redf. on Carriers*, 15, 27. The duty of common carriers is one of law, growing out of their office, and not of contract; and the liability can not be limited, except by a contract assented to by the employer. *Redf. on Carriers*, 30, § 40; *Western Transp. Co. v. Newhall*, 24 *Ill.* 466.

There is no exemption from the common law duty, by the charters of the appellant. By these it became a carrier of all kinds of freight, and, while it could make rules consistent with its duties enjoined by law, it could make none inconsistent with such law. While the railroad company might, by special contract, limit its duties and liabilities, touching the property of the contracting party, it could not agree with another party not to carry for all, or not to deliver to the consignee.

The remedy by mandamus is an appropriate one. The duty is of a public character, and there is no other adequate mode of relief. *Vincent v. Chicago, &c. R. R. Co.*, 49 *Ill.* 33.

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The railroad company will be compelled by mandamus to perform its corporate duties, and to receive and deliver goods as directed.

“No better general rule can be laid down on this subject, than that where the charter of a corporation, or the general statute in force, and applicable to the subject, imposes a specific duty, either in terms or by fair or reasonable construction and implication, and there is no other specific and adequate remedy, the writ of mandamus will be awarded.” 2 *Redf. on Railways*, 279.

A mandamus has been awarded to compel a railroad company to run its cars to a particular point, and there to receive and discharge passengers. *State v. Hartford, &c. R. R. Co.*, 29 *Conn.* 538; *People v. Albany, &c. R. Co.*, 24 *N. Y.* 627.

A mandamus was applied for to compel a railroad company to receive the goods of the relator, and only refused upon the ground that the company was not, by its charter and custom, a carrier of that kind of goods. *Ex parte Robbins*, 7 *Dowl. P. C.* 566; 2 *Shelf. on Railways*, 846.

The law is discussed, and many cases referred to in *Moses on Mandamus*, 155, 168, 171, 176, and 2 *Redf. on Railroads*, 257, 275, 294.

John N. Jewett, for the appellants, in reply.

Mandamus is not the appropriate remedy in this case. *Tappan on Mand.* 57, 64, 65, 69, 72; *People v. Brooklyn*, 1 *Wend. (N. Y.)* 318; *People v. New York*, 10 *Id.* 393; *Boyce v. Russell*, 2 *Cow. (N. Y.)* 444; *Chase v. Blackstone Canal Co.*, 10 *Pick. (Mass.)* 244; *Ottawa v. People*, 48 *Ill.* 234.

Counsel argued in support of these propositions:

1. That at common law, a common carrier was one who undertook, or held himself out as ready to undertake, the carriage of goods, as an occupation, for all

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persons indifferently, by the means and upon the routes adopted by himself.

2. That having entered upon this employment, he was bound by law to receive and carry goods suited to his means of transportation, for all people, without discrimination or preference.

3. That the manner and place of delivery at the end of the route was a matter within his own discretion, in the first instance; the only requirement of the law in this respect being, that, when established, it should be uniformly and consistently adhered to.

4. That neither the public nor individuals have any legal right to demand of the common carrier the assumption of any duties or obligations, other than or different from those which he has assumed by the custom and usages of his business.

5. That a person may be a common carrier without importing that he has undertaken to do, and without being under obligation to do, *everything* which a common carrier might do.

6. That railroad companies, as common carriers, have precisely the same rights of judgment as individual carriers, with the exception that their routes are fixed, and their means of transportation, generally, determined by the charter creating them.

7. That whether they shall adopt the custom of delivery at the residence or place of business of the consignee, and thereby place themselves under obligations to do so, or not, is a matter of discretion, to be determined by themselves, and is, by no means, dependent upon their ability or inability to reach such places with the cars employed by them for transportation from place to place.

8. That, if the law demanded of them such delivery, they would, of necessity, have an implied authority to use the means requisite to make such delivery, and that they might therefrom be required to deliver by

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wagons, at places which could not be reached by their cars.

9. That the obligations of a carrier, corporate or individual, in respect to the carriage and delivery of goods actually received for carriage, are regulated by contract, express or implied, and, in the absence of an express contract, the law implies only an agreement or undertaking to carry and deliver according to the custom and usages of his business.

10. That, having established the custom and usages of his business, the common carrier may be compelled (if mandamus is a proper remedy) to carry and deliver in accordance with that custom and usage, but not otherwise. The reason is, that the custom and usage being valid, fix the limit of his legal duty in this particular, and the right to demand a service can not be broader than the obligation to perform it.

11. That the object and aim of these proceedings is to compel the appellant to depart from the well-established custom and usages of its business, and to make a special contract for the delivery of grain, at a particular place, contrary to such custom and usages.

12. That no duty or obligation to make such a contract is imposed upon the appellant as a common carrier, either by the common law or by statute, and, therefore, the alternative writ is defective in substance, and should have been quashed—notwithstanding the averment of legal duty contained in it.

LAWRENCE, Ch. J.—This was an application for a mandamus, on the relation of the owners of the Illinois River elevator, a grain warehouse in the city of Chicago, against the Chicago & Northwestern Railroad Company. The relators seek by the writ to compel the railway company to deliver to said elevator whatever grain in bulk may be consigned to it upon the line of its road. There was a return duly made to

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the alternative writ, a demurrer to the return, and a judgment *pro forma* upon the demurrer, directing the issuing of a peremptory writ. From that judgment the railway company has prosecuted an appeal.

The facts as presented by the record are briefly as follows :

The company has freight and passenger depots on the west side of the north branch of the Chicago river, north of Kinzie street, for the use, as we understand the record and the maps which are made a part thereof, of the divisions known as the Wisconsin and Milwaukee divisions of the road, running in a northwesterly direction. It has also depots on the east side of the north branch, for the use of the Galena division, running westerly. It has also a depot on the south branch, near Sixteenth street, which it reaches by a track diverging from the Galena line, on the west side of the city. The map indicates a line running north from Sixteenth street, the entire length of West Water street, but we do not understand the relators to claim their elevator should be approached by this line, as the respondent has no interest in this line south of Van Buren street.

Under an ordinance of the city, passed August 10, 1858, the Pittsburg, Fort Wayne, & Chicago Company, and the Chicago, St. Paul, & Fond Du Lac Company (now merged in the Chicago & Northwestern Company) constructed a track on West Water street, from Van Buren street north to Kinzie street, for the purpose of forming a connection between the two roads. The Pittsburg, Fort Wayne, & Chicago Company laid the track from Van Buren to Randolph street, and the Chicago, St. Paul, & Fond Du Lac Company, that portion of the track from Randolph north to its own depot. These different portions of the track were, however, constructed by these two companies, by an arrangement between themselves, the pre-

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cise character of which does not appear, but it is to be inferred from the record that they have a common right to the use of the track from Van Buren street to Kinzie, and do in fact use it in common. The elevator of the relators is situated south of Randolph street, and north of Van Buren, and is connected with the main track by a side track laid by the Pittsburg Company, at the request and expense of the owners of the elevator, and connected at each end with the main track.

Since August 10, 1866, the Chicago & Northwestern Company, in consequence of certain arrangements and agreements on and before that day entered into between the company and the owners of certain elevators known as the Galena, Northwestern, Munn & Scott, Union, City, Munger & Armor, and Wheeler, has refused to deliver grain in bulk to any elevator except those above named. There is also in force a rule of the company, adopted in 1864, forbidding the carriage of grain in bulk, if consigned to any particular elevator in Chicago, thus reserving to itself the selection of the warehouse to which the grain should be delivered. The rule also provides that grain in bags shall be charged an additional price for transportation. This rule is still in force.

The situation of these elevators, to which alone the company will deliver grain, is as follows: The Northwestern is situated near the depot of the Wisconsin division of the road, north of Kinzie street; the Munn & Scott, on West Water street, between the elevator of relators and Kinzie street; the Union & City, near Sixteenth street, and approached only by the track diverging from the Galena division, on the west side of the city, already mentioned; and the others are on the east side of the north branch of the Chicago river. The Munn & Scott elevator can be reached only by the line laid on West Water street, under the city ordi-

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nance already mentioned ; and the elevator of relators is reached in the same way, being about four and a half blocks further south. The line of the Galena division of the road crosses the line on West Water street, at nearly a right angle, and thence crosses the North Branch on a bridge. It appears by the return to the writ, that a car coming into Chicago on the Galena division, in order to reach the elevator of relators, would have to be taken by a drawbridge across the river on a single track, over which the great mass of the business of the Galena division is done, then backed across the river again upon what is known as the Milwaukee division of respondent's road, thence taken to the track on West Water street, and the cars, when unloaded, could only be taken back to the Galena division by a similar, but reversed, process, thus necessitating the passage of the drawbridge, with only a single line, four times, and, as averred in the return, subjecting the company to great loss of time and pecuniary damage in the delay that would be caused to its regular trains and business on that division.

This seems so apparent that it can not be fairly claimed the elevator of relators is upon the line of the Galena division, in any such sense as to make it obligatory upon the company to deliver upon West Water street freight coming over that division of the road. The doctrine of the Vincent case, in 49 *Ill.*, was, that a railway company must deliver grain to any elevator which it had allowed, by a switch, to be connected with its own line. This rule has been re-affirmed in an opinion filed at the present term, in the case of *People ex rel. Hempstead v. Chicago, &c. R. R. Co.*, 55 *Ill.* 95 ; 1 *Am. Railw. Rep.* 480, but in the last case we have also held that a railway company can not be compelled to deliver beyond its own line, simply because there are connecting tracks over which it might pass by pay-

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ing track service, but which it has never made a part of its own line by use.

So far as we can judge from this record, and the maps showing the railway lines and connections, filed as a part thereof, the Wisconsin and Milwaukee divisions, running north-west, and the Galena division, running west, though belonging to the same corporation, and having a common name, are, for the purposes of transportation, substantially different roads, constructed under different charters, and the track on West Water street seems to have been laid for the convenience of the Wisconsin and Milwaukee divisions. It would be a harsh and unreasonable application of the rule announced in the Vincent case, and a great extension of the rule beyond anything said in that case, if we were to hold that these relators could compel the company to deliver at their elevator grain which has been transported over the Galena division, merely because the delivery is physically possible, though causing great expense to the company, and a great derangement of its general business, and though the track on West Water street is not used by the company in connection with the business of the Galena division.

What we have said disposes of the case so far as relates to the delivery of grain coming over the Galena division of respondent's road. As to such grain the mandamus should not have been awarded.

When, however, we examine the record as to the connection between the relators' elevator and the Wisconsin and Milwaukee divisions of respondent's road, we find a very different state of facts. The track on West Water street is a direct continuation of the line of the Wisconsin and Milwaukee divisions; cars coming on this track from these divisions do not cross the river. The Munn & Scott elevator, to which the respondent delivers grain, is, as already stated, upon a side track connected with this track. The respondent

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not only uses this track to deliver grain to the Munn & Scott elevator, but it also delivers lumber and other freight upon this track, thus making it not only legally, but actually, by positive occupation, a part of its road. The respondent, in its return, admits, in explicit terms, that it has an equal interest with the Pittsburg, Fort Wayne, & Chicago Railroad in the track laid in West Water street. It also admits its use, and the only allegation made in the return for the purpose of showing any difficulty in delivering to relators' elevator the grain consigned thereto from the Wisconsin and Milwaukee divisions, is, that those divisions connect with the line on West Water street only by a single track, and that respondent can not deliver bulk grain or other freight to the elevator of relators, even from those divisions, without large additional expense, caused by the loss of use of motive power, labor of servants, and loss of use of cars, while the same are being delivered and unloaded at said elevator and brought back. As a reason for non-delivery on the ground of difficulty, this is simply frivolous. The expense caused by the loss of the use of motive power, labor, and cars, while the latter are being taken to their place of destination and unloaded, is precisely the expense for which the company is paid its freight. It has constructed this line on West Water street, in order to do the very work which it now, in general terms, pronounces a source of large additional expense; yet it does not find the alleged additional expense an obstacle in the way of delivering grain upon this track at the warehouse of Munn & Scott, or delivering other freights to other persons than the relators. Indeed, it seems evident, from the diagrams attached to the record, that three of the elevators to which the respondent delivers grain are more difficult of access than that of the relators, and three of the others have no appreciable advantage in that respect, if not placed at a decided disadvantage,

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by the fact that they can be reached only by crossing the river.

We presume, however, from the argument, that the respondent's counsel place no reliance upon this allegation of additional expense, so far as the Wisconsin and Milwaukee divisions are concerned. They rest the defense on the contracts made between the company and the elevators above named, for exclusive delivery to the latter, to the extent of their capacity. This brings us to the most important question in the case. Is a contract of this character a valid excuse to the company for refusing to deliver grain to an elevator, upon its lines and not a party to the contract, to which such grain has been consigned?

In the oral argument of this case it was claimed, by counsel for the respondent, that a railroad company was a mere private corporation, and that it was the right and duty of its directors to conduct its business merely with reference to the pecuniary interests of the stockholders. The printed arguments do not go to this extent, in terms, but they are colored throughout by the same idea, and in one of them we find counsel applying to the supreme court of the United States, and the supreme court of Pennsylvania, language of severe and almost contemptuous disparagement, because those tribunals have said that "a common carrier is in the exercise of a sort of public office." *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 381; *Sandford v. Railroad Co.*, 24 *Pa.* 380. If the language is not critically accurate, perhaps we can pardon these courts, when we find that substantially the same language was used by Lord Holt, in *Coggs v. Bernard*, 2 *Lord Raymond*, 909, the leading case in all our books on the subject of bailments. The language of that case is, that the common carrier "exercises a public employment."

We shall engage in no discussion in regard to names.

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It is immaterial whether or not these corporations can be properly said to be in the exercise of "a sort of public office," or whether they are to be styled private, or *quasi* public corporations. Certain it is, that they owe some important duties to the public, and it only concerns us now to ascertain the extent of these duties as regards the case made upon this record.

It is admitted by respondent's counsel, that railway companies are common carriers, though even that admission is somewhat grudgingly made. Regarded merely as a common carrier at common law, and independently of any obligations imposed by the acceptance of its charter, it would owe important duties to the public, from which it could not release itself, except with the consent of every person who might call upon it to perform them. Among these duties, as well defined and settled as anything in the law, was the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms, and to deliver them in safety to the consignee, unless prevented by the act of God or the public enemy. These obligations grew out of the relation voluntarily assumed by the carrier toward the public, and the requirements of public policy, and so important have they been deemed that eminent judges have often expressed their regret that common carriers have ever been permitted to vary their common law liability, even by a special contract with the owner of the goods.

Regarded, then, merely as a common carrier at common law, the respondent should not be permitted to say it will deliver goods at the warehouse of A. and B., but will not deliver at the warehouse of C., the latter presenting equal facilities for the discharge of freight, and being accessible on respondent's line.

But railway companies may well be regarded as under a higher obligation, if that were possible, than that imposed by the common law, to discharge their

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duties to the public, as common carriers, fairly and impartially. As has been said by other courts, the state has endowed them with something of its own sovereignty, in giving them the right of eminent domain. By virtue of this power, they take the lands of the citizen against his will, and can, if need be, demolish his house. Is it supposed that these great powers were granted merely for the private gain of the corporators? On the contrary, we all know the companies were created for the public good.

The object of the legislature was to add to the means of travel and commerce. If, then, a common carrier at common law came under obligations to the public, from which he could not discharge himself at his own volition, still less should a railway company be permitted to do so, when it was created for the public benefit, and has received from the public such extraordinary privileges. Railway charters not only give a perpetual existence and great power, but they have been constantly recognized by the courts of this country as contracts between the companies and the state, imposing reciprocal obligations.

The courts have always been, and we trust always will be, ready to protect these companies in their chartered rights, but, on the other hand, we should be equally ready to insist that they perform faithfully to the public those duties which were the object of their chartered powers.

We are not, of course, to be understood as saying, or intimating, that the legislature, or the courts, may require from a railway company the performance of any and all acts that might redound to the public benefit, without reference to the pecuniary welfare of the company itself. We hold simply that it must perform all those duties of a common carrier to which it knew it would be liable when it sought and obtained its charter, and the fact that the public has bestowed

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upon it extraordinary powers, is but an additional reason for holding it to a complete performance of its obligations.

The duty sought to be enforced in this proceeding, is the delivery of grain in bulk to the warehouse to which it is consigned, such warehouse being on the line of the respondent's road, with facilities for its delivery equal to those of the other warehouses at which the company does deliver, and the carriage of grain in bulk being a part of its regular business. This, then, is the precise question decided in the Vincent Case, in 49 *Ill.*, and it is unnecessary to repeat what was there said. We may remark, however, that, as the argument of counsel necessarily brought that case under review, and as it was decided before the reorganization of this court under the new constitution, the court as now constituted has re-examined that decision, and fully concurs therein. That case is really decisive of the present, so far as respects grain transported on the Wisconsin and Milwaukee divisions of respondent's road. The only difference between this and the Vincent Case, is in the existence of the contract for exclusive delivery to the favored warehouses, and this contract can have no effect when set up against a person not a party to it, as an excuse for not performing toward such person those duties of a common carrier prescribed by the common law, and declared by the statute of the state.

The contract in question is peculiarly objectionable in its character, and peculiarly defiant of the obligations of the respondent to the public as a common carrier. If the principle implied in it were conceded, the railway companies of the state might make similar contracts with individuals at every important point upon their lines, and in regard to other articles of commerce besides grain, and thus subject the business of the state almost wholly to their control, as a

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means of their own emolument. Instead of making a contract with several elevators, as in the present case, each road that enters Chicago might contract with one alone, and thus give to the owner of such elevator an absolute and complete monopoly in the handling of all the grain that might be transported over such road. So too, at every important town in the interior, each road might contract that all the lumber carried by it should be consigned to a particular yard. How injurious to the public would be the creation of such a system of organized monopolies in the most important articles of commerce, claiming existence under a perpetual charter from the state, and, by the sacredness of such charter, claiming also to set the legislative will itself at defiance, it is hardly worth while to speculate. It would be difficult to exaggerate the evil of which such a system would be the cause, when fully developed, and managed by unscrupulous hands.

Can it be seriously doubted whether a contract, involving such a principle, and such results, is in conflict with the duties which the company owes to the public as a common carrier? The fact that a contract has been made is really of no moment, because, if the company can bind the public by a contract of this sort, it can do the same thing by a mere regulation of its own, and say to these relators that it will not deliver at their warehouse the grain consigned to them, because it prefers to deliver it elsewhere. The contract, if vicious in itself, so far from excusing the road, only shows that the policy of delivering grain exclusively at its chosen warehouses, is a deliberate policy, to be followed for a term of years, during which these contracts run.

It is, however, urged very strenuously, by counsel for the respondent, that a common carrier, in the absence of contract, is bound to carry and deliver only according to the custom and usage of his business; that it depends

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upon himself to establish such custom and usage; and that the respondent, never having held itself out as a carrier of grain in bulk, except upon the condition that it may itself choose the consignee, this has become the custom and usage of its business, and it can not be required to go beyond this limit. In answer to this position, the fact that the respondent has derived its life and powers from the people, through the legislature, comes in with controlling force. Admit, if the respondent were a private association, which had established a line of wagons, for the purpose of carrying grain from the Wisconsin boundary to the elevator of Munn & Scott, in Chicago, and had never offered to carry or deliver it elsewhere, that it could not be compelled to depart from the custom or usage of its trade. Still the admission does not aid the respondent in this case. In the case supposed, the carrier would establish the terminal points of his route at his own discretion, and could change them as his interests might demand. He offers himself to the public only as a common carrier to that extent, and he can abandon his first line and adopt another at his own volition. If he should abandon it, and, instead of offering to carry grain only to the elevator of Munn & Scott, should offer to carry it generally to Chicago, then he would clearly be obliged to deliver it to any consignee in Chicago to whom it might be sent, and to whom it could be delivered, the place of delivery being upon his line of carriage.

In the case before us, admitting the position of counsel that a common carrier establishes his own line and terminal points, the question arises, at what time and how does a railway company establish them? We answer, when it accepts from the legislature the charter which gives it life, and by virtue of such acceptance. That is the point of time at which its obligations begin. It is then that it holds itself out to

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the world as a common carrier, whose business will begin as soon as the road is constructed upon the line which the charter has fixed. Suppose this respondent had asked from the legislature a charter authorizing it to carry grain in bulk to be delivered only at the elevator of Munn & Scott, and no where else in the city of Chicago. Can any one suppose such charter would have been granted? The supposition is preposterous. But, instead of a charter making a particular elevator the terminus and place of delivery, the legislature granted one which made the city of Chicago itself the terminus, and when this charter was accepted there at once arose, on the part of the respondent, the corresponding obligation to deliver grain at any point within the city of Chicago, upon its lines, with suitable accommodations for receiving it, to which such grain might be consigned. Perhaps grain in bulk was not then carried in cars, and elevators may not have been largely introduced. But the charter was granted to promote the conveniences of commerce, and it is the constant duty of the respondent to adapt its agencies to that end. When these elevators were erected in Chicago, to which the respondent's line extended, it could only carry out the obligations of its charter by receiving and delivering to each elevator whatever grain might be consigned to it, and it is idle to say such obligation can be evaded by the claim that such delivery has not been the custom or usage of respondent. It can be permitted to establish no custom inconsistent with the spirit and object of its charter.

It is claimed by counsel that the charter of respondent authorizes it to make such contracts and regulations as might be necessary in the transaction of its business. But certainly we can not suppose the legislature intended to authorize the making of such rules or contracts as would defeat the very object it had

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in view in granting the charter. The company can make such rules and contracts as it pleases, not inconsistent with its duties as a common carrier, but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. In the case of *Chicago v. Rumpff*, 45 *Ill.* 94, this court held a clause in the charter, giving the common council the right to control and regulate the business of slaughtering animals, did not authorize the city to create a monopoly of the business, under pretense of regulating and controlling it.

It is unnecessary to speak particularly of the rule adopted by the company in reference to the transportation of grain. What we have said in regard to the contract applies equally to the rule.

The principle that a railroad company can make no injurious or arbitrary discrimination between individuals in its dealings with the public, not only commends itself to our reason and sense of justice, but is sustained by adjudged cases. In England, a contract which admitted to the door of a station, within the yard of a railway company, a certain omnibus, and excluded another omnibus, was held void. *Marriot v. L. & S. W. R. R. Co.*, 87 *Eng. Com. Law*, 498.

In *Gaston v. Bristol, &c. R. R. Co.*, 95 *Eng. Com. Law*, 641, it was held, that a contract with certain ironmongers, to carry their freight for a less price than that charged the public, was illegal, no good reason for the discrimination being shown.

In *Crouch v. L. & N. W. R. Co.*, 78 *Eng. Com. Law*, 254, it was held, a railway company could not make a regulation for the conveyance of goods which, in practice, affected one individual only.

In *Sandford v. Railroad Company*, 24 *Pa.* 382, the court held, that the power given in the charter of a railway company to regulate the transportation of the road did not give the right to grant exclusive privileges

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to a particular express company. The court say, "If the company possessed this power, it might build up one set of men and destroy others; advance one kind of business and break down another, and make even religion and politics the tests in the distribution of its favors. The rights of the people are not subject to any such corporate control."

We refer also to Rogers' Locomotive Works v. Erie R. R. Co., 20 *N. J. Eq.* 380, and State v. Hartford, &c. R. Co., 29 *Conn.* 538.

It is insisted by counsel for the respondent that even if the relators have just cause of complaint, they can not resort to the writ of mandamus. We are of opinion, however, that they can have an adequate remedy in no other way, and that the writ will therefore lie.

The judgment of the court below awarding a peremptory mandamus must be reversed, because it applies to the Galena division of respondent's road, as well as to the Wisconsin and Milwaukee divisions. If it had applied only to the latter, we should have affirmed the judgment. The parties have stipulated that, in case of reversal, the case shall be remanded, with leave to the relators to traverse the return. We therefore make no final order, but remand the case, with leave to both parties to amend their pleadings, if desired, in view of what has been said in this opinion.

Judgment reversed.

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BAILEY v. THE HUDSON RIVER RAILROAD
COMPANY.

49 *New York*, 70.

Court of Appeals of New York; April Term, 1872.

Carriers. Delivery of goods. Where goods are shipped by railroad in pursuance of a previous agreement between the consignor and consignee, under circumstances showing an intent on the part of the consignor that the title to them shall vest in the consignee upon delivery to the railroad company, as carrier, and the railroad company receipts for the goods, and agrees to transport safely and deliver them to the consignee, if, by the subsequent direction of the consignor, the railroad company delivers the goods to another person than the consignee, the company is liable to the consignee for a conversion of the property.

Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action for the conversion of goods shipped to the plaintiffs by the defendant's railroad.

It appeared that the firm of Alden, Frink, & Weston, of Cohoes, N. Y., had consigned to the plaintiffs and shipped to them by the defendant's road, three cases of dry goods, upon the account of the consignors. The plaintiffs advanced upon the goods three-fourths of their value, and also loaned the consignors the sum of three thousand nine hundred and seventy-four dollars and thirteen cents, for which the latter gave the check of their firm, dated a few days ahead. The check was not paid, and the parties then agreed that Alden, Frink, & Weston should send plaintiffs, in payment of the debt, eight more cases of dry goods; and the eleven cases were all delivered to the defendant's agent, in

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Troy, to be transported and delivered to the plaintiffs, at New York city, and the defendant gave its receipt, agreeing so to transport and deliver them. Invoices of all the goods were also sent to the plaintiffs, stating that the goods were consigned to the plaintiffs, on account of Alden, Frink, & Weston. While the goods were still in the possession of the defendant, Mr. Frink, without the knowledge of the other members of the firm of Alden, Frink, & Weston, undertook to change the destination of the goods; and upon his order, without requiring the return of the receipts given, the defendant delivered the goods to other parties, by whom they were sold, on account of Frink, and the proceeds paid over to him. It was shown that the plaintiffs demanded the goods from the defendant, at New York.

The court directed a verdict for the plaintiffs for the value of the property; and the defendant excepted. Judgment was entered upon the verdict for the plaintiffs, and the defendant appealed to the general term. The judgment was affirmed, and the defendant appealed to the court of appeals.

T. R. Strong, for the appellant.

Samuel Hand, for the respondents.

CHURCH, Ch. J.—It is undisputed that Alden, Frink, & Weston delivered the goods in question to the defendant, to be transported by them to the plaintiffs; that they were consigned to the plaintiffs, and the packages properly marked with the name of the plaintiffs' firm, and the defendant gave a receipt for the same, agreeing to deliver the goods safely to the plaintiffs, at the city of New York. It is also undisputed that the plaintiffs had made a specific advance upon a portion of the goods, and the remainder were shipped in pursuance of an agreement between the plaintiffs and Alden, Frink, & Weston, to pay for money borrowed

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by the latter of the former a few days previous, and that invoices of all the goods, stating the consignment and shipment by the defendant's railroad, had been forwarded to the plaintiffs by mail. This was substantially the condition of things on October 17, when one of the members of the firm of Alden, Frink, & Weston, for his individual benefit, but in the name of his firm, changed the destination of the goods, and the defendant delivered them in pursuance of such changed destination to another person. The question is whether the title had vested in the plaintiffs. I think it had. It is clear that the consignors delivered the goods to the carrier for the plaintiffs in compliance with their contract to do so. The parol contract was thereby executed, and the title vested in the plaintiffs. The plaintiffs occupied the legal position of vendees after having paid the purchase money and received the delivery of the goods. But it is unnecessary, in order to uphold this judgment, to maintain that the plaintiffs occupied strictly the relation of vendees. The legal rights of a vendee attach when goods are shipped to a commission merchant, who has made advances upon them in pursuance of an agreement between the parties. Such an agreement may be either inferred from the circumstances or shown by express contract. *Holbrook v. Wight*, 24 *Wend. (N. Y.)* 169; *Haille v. Smith*, 1 *Bos. & Pul.* 563. In the latter case, EYRE, J., said: "From the moment the goods were set apart for this particular purpose, why should we not hold the property in them to have changed, it being in perfect conformity to the agreement and such an execution thereof as the justice of the case requires." The same principle has been repeatedly adopted. *Grosvenor v. Phillips*, 2 *Hill (N. Y.)* 147.

It must appear that the delivery was made with intent to transfer the property. Until this is done the parol agreement is executory, the title remains in the

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consignor, and he has the power to transfer the property to whomsoever he pleases, and render himself liable for the non-performance of the contract. It is urged by the counsel for the defendant that no bill of lading was forwarded or delivered to the plaintiffs, and that until this was done the title remained in the consignors. This is undoubtedly true in many cases; but it is mainly important in characterizing the act of the shipper, and showing with what purpose and intent the goods were delivered to the carrier. If A. has property, upon which he has received an advance from B. upon an agreement that he will ship it to B. to pay the advance, or to pay any indebtedness, he may or may not comply with his contract. He may ship it to C. or he may ship it to B. upon conditions. As owner, he can dispose of it as he pleases. But if he actually ships it to B. in pursuance of his contract, the title vests in B. upon the shipment. The highest evidence that he has done so is the consignment and unconditional delivery to B. of the bill of lading. If the consignor procures an advance upon the bill of lading from a third person, or delivers or indorses the bill of lading to a third person for a consideration, it furnishes equally satisfactory evidence that the property was not delivered to the consignee, for the simple reason that it was delivered to some one else. But I apprehend that if a consignor who had made such an agreement retained in his own possession a duplicate of the bill of lading, and notified the consignee by letter that he had shipped the property for him in pursuance of the agreement, or in any other manner the intention thus to ship it was evinced, the title would pass as effectually, as between them, as if he had forwarded the bill of lading. The question whether a subsequent indorsee of the bill of lading for a valuable consideration could acquire any rights against the consignee, is not involved. As against the

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consignor the delivery of the property to the carrier, with intent to comply with his contract, vests the title in the consignee. It is largely a question of intention. In *Mitchell v. Ide*, 39 *C. S. R.* 260, cited by the defendants, Lord DENMAN said : "The intention of Mackenzie to transfer the property to the plaintiff is unquestionable, and we think that under the circumstances he has carried that intention into effect." And in *Bank of Rochester v. Jones*, 4 *N. Y.* 501, this court said : "When the bill of lading has not been delivered to the consignee, *and there is no other evidence of an intention* on the part of the consignor to consign the specific property to him, no lien will attach." In that case the bill of lading was not only not sent to the consignee, but was transferred to the plaintiffs, and money borrowed upon it, and there was no evidence of an intention to consign the flour to the defendant except upon the condition of paying the money so borrowed. It should be observed also that in that case there was no agreement to consign the property to the defendant as security, or in payment of the indebtedness due him from the consignor. Such an agreement, either express or implied, is important, although not conclusive, in showing the intent with which the act was done. In this case there was no other bill of lading than the receipt produced in evidence, and no duplicate was taken ; but the intention of Alden, Frink, & Weston to transfer this specific property to the plaintiffs, to be applied upon their indebtedness, conclusively appears by the undisputed evidence. 1. By the agreement the day prior to the shipment. 2. By forwarding invoices of the shipment to the plaintiffs. 3. By making the shipment unconditionally. 4. By retaining the receipt given by the defendant, and neither making or attempting to make any use of it.

These acts were so unequivocal of an intention to transfer the property to the plaintiffs that there remains

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no room for doubt. The moment these acts were done, the title vested in the plaintiffs, and the consignors were powerless to interfere with the property.

The recent case of Cayuga County National Bank v. Daniels (not reported), was decided against the consignees upon the distinction above referred to. It was held in that case that the consignors did not deliver the property to the carrier with the intention to vest the title in the defendants, except upon condition of paying a draft discounted by the plaintiffs, and that the bill of lading was delivered upon that condition, and that on the defendants' refusal to comply with the condition, they acquired no right or title to the property, and that the case therefore came within the principle of the Bank of Rochester v. Jones, *supra*. Here the intention to vest the title is clear and plain. It is urged that the words "on our account," in the invoices, evinced an intention not to vest the title in the plaintiffs. They can have no such effect in this case, even if standing alone and unexplained they might have. A bill of lading, for which, as between the parties, the invoices were a substitute, can always be explained by parol. It may be shown by parol to have been intended as evidence of an absolute sale, a trust, a mortgage, a pledge, a lien, or a mere agency. 2 Hill, 151; 4 N. Y. 501, and cases cited. The actual agreement and transaction will prevail, and it was proved by two of the members of the firm, and uncontradicted, that the goods were in fact shipped in pursuance of the agreement. Besides, these words are not necessarily inconsistent with the agreement. The goods were not purchased absolutely by the plaintiffs at a specified price, but were to be sold and the avails applied. The relation of the plaintiffs was more nearly that of trustee, having the title, and bound to dispose of the property and apply the proceeds in a particular manner, and the consignors were the *cestuis que trust*,

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having the legal right to enforce the terms of the agreement for their benefit. In this sense the property was shipped on their account, and the agreement is consistent with the meaning of those words. The statute of frauds has no application. 1st. There was no sale. 2nd. If there was, the consideration was paid. 3rd. The property was specified, when the agreement was made, as being that which had been and was then being shipped, and the plaintiffs agreed to accept that particular property, and the subsequent delivery to the carrier agreed upon was in legal effect a delivery to the plaintiffs. *Cross v. O'Donnell*, 44 *N. Y.* 661; *Stafford v. Webb*, *Lalor's Sup. (N. Y.)* 217.

The defendant is liable for a *conversion* of the property. It had receipted the property and agreed to transport safely, and deliver it to the plaintiffs. Instead of complying with its contract, it delivered the property to another person by the direction of one who had no more legal authority over the property than a stranger, without the return even of its receipt. The plaintiffs had vested rights which the defendant was bound to respect, and with a knowledge of which it was legally chargeable. 45 *N. Y.* 49; 6 *Hill (N. Y.)* 586; 24 *Wend. (N. Y.)* 169; *Story on Bailment*, 414; 31 *N. Y.* 490. It was its duty to deliver the property to the real owner. 45 *N. Y.* 34.

Judgment affirmed with costs.

All concurred.

Judgment affirmed.

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**PRICE v. THE OSWEGO & SYRACUSE RAIL-
WAY COMPANY.**

50 *New York*, 218.

*Court of Appeals of New York; November Term,
1872.*

Carriers. Delivery of goods. Where goods are fraudulently ordered in a fictitious name, and are shipped by railway, in compliance with the order, directed to such fictitious name, the railway company which receives and transports the goods, if it delivers them to a stranger giving such fictitious name, without requiring from him evidence of his identity, is liable to the consignor for the value of the goods.

Appeal to the court of appeals of New York from the general term of the supreme court for the fourth judicial department.

This was an action to recover the value of goods carried by the defendant, and alleged to have been improperly delivered. The facts found by the referee before whom the case was tried are fully stated in the opinion. The referee reported in favor of the defendant, and judgment was entered accordingly, from which the plaintiff appealed to the general term, which affirmed the judgment for the defendant; and the plaintiff appealed to the court of appeals.

D. Pratt, for the appellant.

Edwin Allen, for the respondent.

GROVER, J.—The referee found as a conclusion of law, from the facts found, that the defendant having delivered the bags to the person who made the order for them (although in the name of a fictitious firm),

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without notice of the fraud, was not liable to the plaintiff therefor. To this conclusion the appellant excepted. The counsel for the respondent insists that if the legal conclusion is not sustained by the facts found, the court will assume that he found such additional facts as were necessary for that purpose. This position is correct, subject, however, to the qualification that it must appear from the case that such additional findings would have been warranted by the evidence. *Oberlander v. Spiess*, 45 *N. Y.* 175. In the present case there was no evidence warranting the finding of any additional facts sustaining the legal conclusion. The question, therefore, is whether such conclusion is sustained by the facts found. The facts (so far as material) found were: That the plaintiff, on and prior to September, 1866, was a dry-goods merchant, doing business in Syracuse. That the defendant was a common carrier of goods between Syracuse and Oswego. That a few days prior to September 10, 1866, Caleb B. Morgan, a resident of Syracuse, received a letter by mail, dated and mailed at Oswego, directed to him at Syracuse, signed S. H. Wilson & Co., inquiring the price of bags. That Morgan had been a dealer in bags, but had given up the business, and upon receipt of the letter he delivered the same to the plaintiff, who kept bags for sale, and requested the plaintiff to inform him of the price of the said bags. That Morgan did not know any person or firm by the name of S. H. Wilson & Co., nor had he heard of any such person or firm, but delivered the letter to the plaintiff, believing it had been written in good faith, in the ordinary course of business, by a firm wishing to purchase bags. That the plaintiff upon receipt of the letter gave to Morgan the prices of bags, who communicated them in a letter, addressed and mailed by him to S. H. Wilson & Co., Oswego. That afterward, and on September 10 or 11, the plaintiff received

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through the post-office at Syracuse a letter, mailed at Oswego, as follows :

“OSWEGO, Sept. 10, 1866.

“MR. MILTON PRICE.—*Sir*: We are in want of some bags, and wrote Mr. Morgan, supposing he was in the trade, and he has quoted your prices for stock, &c. Please send us by rail 100 of each, and hope you can make the price a little less, and will be able to give you a larger order soon. Please send bill by mail, and we will remit check for amount of same.

“ (Signed) S. H. WILSON & Co.”

That on September 13, 1866, the plaintiff, with a view of complying with the order, delivered to the defendant at Syracuse three bales of bags, of the value of two hundred and five dollars, directed to S. H. Wilson & Co., Oswego, and the defendant undertook, as a common carrier, to carry the bags to Oswego, and there deliver them to the consignees, and also mailed a bill of the bags to S. H. Wilson & Co., Oswego. That the defendant carried the bags to Oswego the same day, and soon after their arrival at Oswego, and on the same day, a man called at the office of the defendant there, and asked defendant's agent if three bales of bags, directed to S. H. Wilson & Co., had arrived. He was informed that they had, and he then said they were what he wanted, and offered to and did pay the freight thereon, and they were delivered to him by the agent of the defendant, upon signing a receipt therefor in the name of S. H. Wilson & Co., and they were taken away. That the plaintiff did not know any person or firm by the name of S. H. Wilson & Co., and had no information of any such person or firm, except what was contained in their letter to him of September 10, and in the letter to Morgan. In fact, there was no such firm as S. H. Wilson & Co. in business at Oswego, or elsewhere, and the letters written in the name of S. H. Wilson & Co. and the order

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were a part of a scheme on the part of some person or persons to defraud the plaintiff of his property, and no part of the purchase price has been paid, nor has the property been recovered, or the person who received the same from the defendant been traced. That the defendant, when said bags were received and delivered, did not know any person or firm by the name of S. H. Wilson & Co., nor did the defendant know the person to whom the bags were delivered, nor did they require any evidence of the identity of the person, or of his being connected with the firm of S. H. Wilson & Co. That it was the usual custom of the defendant not to deliver goods to a stranger without his being identified, or his satisfying the defendant, by papers or otherwise, that he was entitled to receive them ; and further, that reasonable care and prudence required such precautions to be taken. That the person to whom the bags were delivered by the defendant was the person who wrote the letters signed S. H. Wilson & Co., or his authorized agent to receive said bags in case they should be sent pursuant to the order of September 10. That there was no evidence from which it could be found whether his name was S. H. Wilson or not. That when the plaintiff sent the bags he supposed that S. H. Wilson & Co. was the name of a firm at Oswego, and when the defendant delivered them at Oswego it had no knowledge of the fraud, and supposed that the person to whom they were delivered was a member of, or represented the firm of S. H. Wilson & Co.

It is the duty of a carrier to carry the goods to the place of delivery, and deliver them to the consignee. When goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known, and can not after reasonable diligence be found, the carrier may be discharged from further responsibility as carrier, by placing them in a proper warehouse for and on account of the owner.

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Fisk v. Newton, 1 *Den.* (N. Y.) 45. The responsibility continues as carrier until discharged in the manner above stated. Hence, a delivery to a wrong person, although upon a forged order, will not exonerate the carrier from responsibility. Powell v. Myers, 26 *Wend.* (N. Y.) 591. In examining the cases, the distinction between the liability of carriers and warehousemen must be kept in mind. The former is responsible as insurer. The latter for proper diligence and care only, in the preservation of the property and its delivery to the true owner. The former must, at their peril, deliver property to the true owner, for if delivery be made to the wrong person, either by an innocent mistake or through fraud of another, they will be responsible, and the wrongful delivery will constitute a conversion. McEntee v. New Jersey Steamboat Co., 45 *N. Y.* 34. It is of the liability of a warehouseman after the responsibility as carrier had terminated, that the chief judge is speaking, in the opinion in Burnell v. New York Central R. R. Co., 45 *N. Y.* 184, where he holds that the defendant was responsible only for due care and diligence. In the present case, the goods were consigned to S. H. Wilson & Co., Oswego. This plainly indicated some person, or rather persons, known by and doing business under that name. But as there was no such firm, and so far as the findings or case show, never had been, delivery could not be made to the consignees. Then, as already seen, it became the duty of the carrier to warehouse the goods for the owner. Instead of this, the defendant delivered them to a stranger, without making any inquiry as to who or what he was, simply upon his inquiring if such goods for Wilson & Co. had arrived, and upon being informed that they had, saying that he wanted them. If the case had been determined by the referee upon the question whether due care had been used by the defendant, it would have been necessary to determine

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whether the goods were at the time held as carrier or as bailee of another character, as in the latter case only will the exercise of proper care exonerate from liability for the loss of the property. But as the legal conclusion of the referee shows that the judgment was not based upon any finding upon that question, but upon the legal conclusion of the referee that the defendant was discharged from liability by having delivered the goods to the person who wrote the letters and orders, or his authorized agent, it is unnecessary to determine whether the defendant at the time held the goods as carrier or warehouseman, because if the legal conclusion is correct, a delivery to this person or his agent would have discharged the defendant in either case, entirely irrespective of the degree of care exercised in making delivery. The entire findings of the referee show that he would have held the defendant liable had the delivery under a like state of facts been made to any other than this person. The opinion of the learned judge, given at the general term, shows that the judgment was affirmed by that court upon the same ground, and that the case would have been differently decided had the delivery been made to some other person. Indeed, this is the only reason that can with any plausibility be given for the judgment. As a finding that proper care had been exercised by a bailee of goods whose duty it was to keep them for the owner, when he had delivered them to an entire stranger, who claimed to be the owner, and gave no evidence of his right except to make inquiry if they had arrived for the consignee, and saying that he wanted them, would be wholly unsupported by the evidence. The question is, whether the person who wrote the order acquired a right, so far as the defendant was concerned, to a delivery of the goods; in other words, whether as to it he was the consignee. If he was, the conclusion of the referee was correct. In that case,

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delivery to him discharged the carrier, upon the principle that any delivery, valid as to the consignee, is a defense for the carrier as to all persons. It would hardly be claimed, in case there had been a firm doing business at Oswego under the name of S. H. Wilson & Co., a swindler would make himself consignee of goods or acquire any right whatever thereto, which were in fact consigned to such firm, simply by showing that he had forged an order in the name of the firm directing such consignment. If he would not thereby acquire any right to the goods, delivery to him would not protect the carrier any more than if made to any other person. In *American Exp. Co. v. Fletcher*, 25 *Ind.* 492, the facts were that a person claiming to be J. O'Riley presented himself to a telegraph operator, who was also agent of the express company, and presented a dispatch to be forwarded to the plaintiff, signed J. O'Riley, requesting him to send one thousand nine hundred dollars, which the operator sent through. That in due time the operator, in his capacity of agent for the express company, received a package purporting to contain valuables, addressed to J. O'Riley, whereupon the same person who had sent the dispatch presented himself and demanded the package, which was delivered to him. It turned out that this person was not J. O'Riley, but a swindler. *Held*, that the express company was liable to the plaintiff for the money. The case is silent as to whether J. O'Riley was a fictitious name, but I infer that it was not, as the plaintiff would not be likely to forward that amount of money to a person unknown to him. It will be seen that this was a much stronger case for the company than is that of the present defendant, so far as care was concerned, for the delivery was made to the person known by the company to be the one who sent the dispatch, while the defendant knew nothing whatever about the letters or order or how the goods came to be

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forwarded, consigned as they were. But the case directly decides that no right to the package was acquired by the swindler by sending a dispatch therefor in the name of another. If no right is acquired by sending a dispatch in the name of a real person, it is a little difficult to see how any is acquired by writing in the name of a firm having no existence, especially when the facts show, as in the present case, the consignor supposed he was dealing with a substantial business firm, and the consignment showed that it was intended to be made to such a firm.

In *Ward v. Vermont, &c. R. R.*, one Collins represented to the plaintiff that there was a person of the name of J. F. Roberts residing at Roxbury, Mass., and fraudulently induced the plaintiff to consign goods to him. In fact, no such person resided there. Upon the arrival of the goods, Collins went to a truckman and personated Roberts, and as such sent the truckman for the goods, to whom they were delivered by the company. *Held*, that the company was liable to the plaintiff therefor. That, in principle, is like the present case. In this the swindler had in substance represented to the plaintiff that there was a business firm at Oswego wishing to purchase bags, and had fraudulently procured a consignment of bags from the plaintiff to this firm, when in fact there was no such firm. This gave the defendant no right to deliver the goods to any one else. The argument for the defendant is that the plaintiff consigned the goods to S. H. Wilson & Co., and there being no such firm, the person signing the name of the firm to the letter and order was, in respect to the goods, to be regarded as the firm for the purpose of delivery by the defendant. This is in direct conflict with the intention of the plaintiff, apparent from the consignment. That authorized a delivery to S. H. Wilson & Co., and to no other. There was not a particle of proof that the person who wrote the letter was ever

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known to any one by that name. The consignment did not therefore authorize a delivery to him. The defendant had no knowledge whatever of the letters, and his writing them furnished no evidence to it of his doing business in that name.

Duff v. Budd, 7 *Eng. Com. Law*, 399, was a case much like the present. The evidence that the person who received the goods was the same stranger who ordered them in a fictitious name, was equally strong as in the present case, yet there is no intimation that by this fraud he acquired any right to the goods or the defendant any authority to deliver them to him, and the plaintiff was held entitled to recover of the carrier therefor. See also *Birkett v. Willan*, 4 *Eng. Com. Law*, 540. *Heugh v. London Railway Co.*, 5 *Law Exch. Rep.* 51, and *McKean v. Ivor*, 6 *Id.* 36, are relied upon by the defendant. In the former, one Nurse, who had been in the employ of a rubber company which had ceased to do business, wrote and sent to the plaintiff an order for goods in the name of the company. The plaintiff forwarded the goods by the defendant, a common carrier, consigned to the company. The defendant tendered the goods at the place where the company had carried on business. The persons in possession refusing to receive, they were taken away by the defendant, who, according to the course of business, wrote a letter addressed to the company, advising of the receipt of the goods and requesting their removal. Nurse thereafter came and presented this letter, with an order for the delivery of the goods, signed in the name of the company by him, to the defendant, who thereupon delivered the goods to him. *Held*, that the liability of the defendant as carrier was terminated by the tender, and that whether the defendant had been negligent in the delivery was a question of fact for the jury. The latter was a case where goods had been sent to a fictitious firm upon a fraudulent order, by the

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plaintiff, consigned to the firm at 71 George-street, Glasgow, that being the address specified in the order, by the defendant, a carrier, who, upon the arrival of the goods, followed the usage universal among carriers at Glasgow, which was to send notice of the arrival of the goods, with a request for their removal. This notice was received by the one giving the order, who indorsed the name of the firm thereon, and presented it to and obtained the goods from the defendant. *Held*, that the defendant, having delivered the goods according to the universal usage of carriers, had complied with the directions of the consignor, which must be taken as including such usage, and was therefore not liable.

In *Stephenson v. Hart*, 4 *Bing.* 476, it was expressly held that the carrier had no right to make delivery to the writer of the fictitious order. But it is said that the plaintiff intended the goods should be delivered to the writer of the order. Not at all. He did not consign them to the writer of any order, but to Wilson & Co. This is the only evidence of his intention as to the persons to whom delivery should be made. It is further said that it was the plaintiff's negligence in forwarding the goods without ascertaining that there was in fact such a firm. I am unable to see what the defendant had to do with this. Its duty was to deliver to the firm, and if that could not be found, to warehouse and keep for the owner. The same might be said in every case where goods were forwarded to a consignee supposed to be at a particular place, but who, in fact, was not there. The usage of the defendant can not avail him in this case. The referee has found just what was done. This accords with the evidence, in which there was no conflict.

The judgment appealed from must be reversed, and a new trial ordered, costs to abide event.

CHURCH, Ch. J., dissented.

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ALLEN, J., did not vote.

Others concurred.

Judgment reversed.

THE JEFFERSONVILLE, MADISON, & INDIAN-
APOLIS RAILROAD COMPANY v. GENT.

85 *Indiana*, 89.

Supreme Court of Indiana; May Term, 1871.

Carriers. Delivery of goods to consignee. Pleading. In an action against a railway company, for a failure to deliver goods received by it for transportation as a common carrier, the complaint must show that, after the receipt of the goods by the defendant, and before the demand for their delivery was made, the goods had actually been transported to their destination, or that a reasonable time had elapsed for their transportation, in due course, or that the defendant had converted them to its own use; and the complaint must also show that the defendant's reasonable freight and charges have been paid or tendered, or some sufficient reason or excuse for not doing so must be alleged.

Appeal to the supreme court of Indiana from the circuit court for Bartholomew county.

This was an action to recover the value of a quantity of flour received by the defendant, as a common carrier, for transportation, but not delivered as agreed.

The substance of the pleadings and the proceedings in the case, with the questions involved, are fully stated in the opinion. The defendant having demurred to the complaint, the demurrers were overruled, and the defendant excepted. Judgment was rendered for the plaintiffs; from which the defendant appealed.

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S. Stansifer, T. A. Hendricks, O. B. Hord, and A. W. Hendricks, for the appellant.

R. Hill, and G. W. Richardson, for the appellees.

PETTIT, J.—Thomas Gent, Thomas Gaff, and James Gaff, partners as Thomas Gent & Co., complain of the Jeffersonville, Madison, & Indianapolis Railroad Company, and say that the defendant is a corporation, and a common carrier of goods for hire; that the plaintiffs, at the request of defendant, caused to be delivered to defendant divers goods, that is to say, one hundred barrels of flour of the plaintiffs, to be carried by the defendant in and by certain cars of the defendant from Columbus to Indianapolis, in said state, and there to be delivered to the plaintiffs, for freight and reward in that behalf; that the defendant then and there gave to plaintiffs a bill of lading, a copy of which is filed herewith, and the defendant there received the same for the purpose aforesaid; that afterwards, to wit, on the ——— day of ———, 1867, the plaintiffs at Indianapolis, aforesaid, demanded said goods from defendant, but defendant did not deliver said goods to plaintiffs, but then and there failed and refused to do so. They aver that said goods were then and there of the value of fifteen hundred dollars.

The plaintiffs further complain of defendant, and say that defendant is a corporation, and is a common carrier of goods for hire from Columbus to Indianapolis, in said state; that the defendant converted to its own use and wrongfully deprived the plaintiffs of the use and possession of the plaintiffs' goods; that is to say, one hundred barrels of flour, of the value of fifteen hundred dollars, which the plaintiffs had delivered to the defendant as a common carrier aforesaid, and which it had received as such carrier, to be carried by it for the plaintiffs, for reward in that behalf.

Wherefore plaintiffs demand judgment for fifteen hundred dollars.

To this the defendant demurred for misjoinder of causes of action, and to each paragraph severally for want of sufficient facts being stated therein to constitute a cause of action. The demurrers were overruled, and exceptions taken to the ruling, and this is assigned for error.

Whether right or wrong, we can not reverse for the ruling on the misjoinder of causes of action. 2 *Gar. & H.* 81, § 52.

The court erred in overruling the demurrer to the first paragraph of the complaint, and for this error the judgment must be reversed.

The averments of the first cause of action are substantially, that the plaintiffs delivered to defendant, at Columbus, one hundred barrels of flour, to be, by the defendant, transported by rail to Indianapolis, for freight and reward to be paid to defendant by plaintiffs; that thereafter, to wit, on the ——— day of ———, 1867, plaintiffs demanded the goods of defendant, at Indianapolis, but the defendants then and there refused to deliver the same to plaintiffs.

There is no averment as to the day when the flour was delivered to defendant at Columbus, except as shown by the bill of lading, and there is no averment fixing the time when the demand was made at Indianapolis. The allegation is simply, that afterwards, to wit, on the ——— day of ———, 1867, the demand was made. The pleading must be construed most strongly against and most unfavorably to the pleader. There is nothing in the pleading to preclude the idea that the demand at Indianapolis was made the next hour or the next day after the delivery at Columbus, before the flour had been or could have been transported to Indianapolis, in a reasonable time after its delivery, in due course of railroad transportation; and if the flour

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had not been received at Indianapolis, when the demand was made, for the reason that a reasonable time for its transportation had not elapsed, the refusal of the defendant's agents at Indianapolis to deliver it, fixed no liability upon the company.

The pleading, to be good, ought, we think, to show either that the flour had been transported to Indianapolis when the demand was made, or that sufficient time had elapsed for its transportation, or that the flour had been converted by the defendant to its own use.

There is another fatal objection to this cause of action in our judgment; common carriers have a right to hold goods transported by them until their reasonable freights and charges are paid.

There is no allegation that the defendant's reasonable freights and charges had been paid or tendered to defendant, nor is any reason or excuse given for not having done so. Under the averments of the pleading the defendant had a perfect right to hold the flour, even though it had been received at Indianapolis, until the charges for the transportation thereof had been paid or tendered.

Story on Bailments lays down the law as follows, secs. 585 and 588: "In virtue of the delivery of the goods, carriers acquire a special property in them, and may maintain an action against any person who displaces that possession or does any injury to them. This right arises from their general interest in conveying the goods, and their responsibility for any loss or injury to them during their transit. And, having once acquired the lawful possession of the goods for the purpose of carriage, the carrier is not obliged to restore them to the owner again, even if the carriage is dispensed with, unless upon being paid his due remuneration; for by the delivery he has already incurred certain risks. The carrier is also entitled to a lien on the goods for his hire (and his advances to others for freight and storage),

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and is not compellable to deliver them until he receives it, unless he has entered into some special contract, by which it is waived." See also sections 107 and 120.

The demurrer to the second paragraph of the complaint was properly overruled. That paragraph charges a conversion of the goods, and in such case the carrier is not entitled to have a demand made for the goods of him or payment of the freight charges to him, before suit brought. *Chitty on Carriers*, 91, 131; *Robinson v. Skipworth*, 23 *Ind.* 311, 315; *Story on Bailments*, § 107.

This decision renders it unnecessary for us to notice any rulings of the circuit court which subsequently took place, for had the demurrer been sustained to the first paragraph of the complaint, the pleadings and after issues and rulings might have been very different from what they are, and can not, therefore, be considered as properly arising in the record.

The judgment is reversed, at the costs of the appellees; cause remanded, with instructions to the court below to sustain the demurrer to the first paragraph of the complaint, and for further proceedings.

Zinn v. New Jersey Steamboat Co.

ZINN v. THE NEW JERSEY STEAMBOAT COMPANY.

49 *New York*, 442.*Court of Appeals of New York; May Term, 1872.*

Carriers. Delivery of goods to consignee. A consignee of goods, whether they are transported by water or railroad, is entitled to reasonable notice from the carrier of their arrival, and to a fair opportunity to remove them. Where goods are shipped by railroad, and before reaching their destination, are, without the knowledge of the consignee, transferred by the carrier to a steamboat, and are transported to their destination by such steamboat, the consignee is under no obligation to be on the look out for them at the wharf. And where the consignee is unknown to the carrier, the latter is liable for the consequences of neglecting to make a diligent effort to find him.

Where a carrier neglects to give notice to the consignee of his readiness to deliver goods on their arrival, and from the consequent delay in delivery, the goods depreciate in value, the subsequent neglect of the consignee to remove them within a reasonable time, after notice is actually given him, can not be considered contributory negligence on his part, which will relieve the carrier from liability for the depreciation. The duties of carrier and consignee are not concurrent, but in succession, and their negligence can not contribute to the same injury.

Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action to recover damages alleged to have resulted from the failure of the defendant to deliver to the plaintiffs goods consigned to them, and delivered to the defendant, as a common carrier, by another carrier.

The goods were shipped by railroad from Augusta, Michigan, and marked with the name of the plaintiffs'

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firm, "Zinn, Aldrich, & Co., New York." On reaching Albany, they were delivered to the defendant to complete the transportation to New York, and arrived there on October 28, 1866. The plaintiffs were not aware of the arrival of the goods; no notice of their arrival was given by the defendant to the plaintiffs, and only slight efforts made by its agents to find the plaintiffs. No inquiries were made for them of any one named Zinn. The goods were stored with a warehouseman on October 30, 1866. The plaintiffs had no information of the arrival of the goods until February 16, 1867, when they had depreciated in value. The plaintiffs received them from the warehouseman about the middle of April, 1867, when they had still further depreciated.

The jury found a verdict for the plaintiffs. The defendant moved for a new trial on the judge's minutes. The motion was denied, and defendant's exceptions ordered to be heard, in the first instance, at the general term. The general term affirmed the order denying a new trial, and directed judgment upon the verdict for the plaintiffs. The defendant appealed.

W. P. Prentice, for the appellant.

Henry N. Beach, for the respondents.

ALLEN, J.—Common carriers assume not only the safe carriage and delivery of property to the consignee, but also that merchandise and other property received by them for transportation shall be carried to the place of destination, and delivered with reasonable dispatch; and for any unreasonable delay, either in the transportation, or its delivery after its arrival at the terminus of the route, they are responsible. *Hand v. Baynes*, 4 *Whart.* 204; *Raphael v. Pickford*, 6 *Scott Ch. N. R.* 478; *Blackstock v. New York, &c. R. Co.*,

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20 *N. Y.* 48; *Black v. Baxendale*, 1 *Exch.* 410. The liability of the carrier to answer for the non-delivery of goods, or the want of reasonable expedition in their delivery, after their arrival at the place of their destination, was not controverted upon the trial.

The defendant in this action was not bound to deliver the merchandise to the consignees at their place of business. A delivery or offer to deliver at the wharf would have discharged the carrier from all responsibility as such carrier. Carriers by water or railroad are not held to a delivery of goods to the consignees at any place other than at the wharf of the vessel or the railroad station, and a notice to the consignee of the arrival of the goods, and of a readiness to deliver, comes in place of a personal delivery, so far as to release the carrier from the extraordinary and stringent liability incident to that class of bailees. *Gibson v. Culver*, 19 *Wend.* (*N. Y.*) 305; *Fisk v. Newton*, 1 *Denio* (*N. Y.*) 45; *Fenner v. Buffalo, &c. R. R. Co.*, 44 *N. Y.* 505.

If the consignee is present, the goods may be tendered or delivered to him personally, and he is bound to remove them within a reasonable time. If he is not present, he is entitled to reasonable notice from the carrier of their arrival, and a fair opportunity to take care of and remove them. If the consignee is unknown to the carrier, the latter must use proper and reasonable diligence to find him; and if, after the exercise of such diligence, the consignee can not be found, the goods may be stored in a proper place, and the carrier will have performed his whole duty, and will be discharged from liability as a carrier. But for want of diligence in finding the consignee, and giving notice of the arrival of the goods, the carrier is liable for the damages resulting from a delay in the receipt of the goods by the consignee, occasioned by such want of diligence. He can only relieve himself from liability

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by storing the goods, after, by the use of reasonable diligence, he is unable to find the consignee. *Witbeck v. Holland*, 45 *N. Y.* 13. A common carrier has not performed his contract as carrier until he has delivered or offered to deliver the goods to the owner, or done what the law esteems equivalent to a delivery. *Smith v. Nassau, &c. R. R. Co.*, 7 *Fost. (N. H.)* 86; *Price v. Powell*, 3 *N. Y. (3 Comst.)* 322. When the consignee is unknown to the carrier, a due effort to find him is a condition precedent to a right to warehouse the goods, and, as notice to the consignee takes the place of a personal delivery of the goods, and as a due and unsuccessful effort to find the consignee will alone excuse the want of such notice, it follows that if a reasonable and diligent effort is not made to find the consignee, the carrier is liable for the consequence of the neglect. What is a due, a reasonable effort, and what is proper and reasonable diligence, depends necessarily very much upon the circumstances of each case, and, in the nature of things, is a question of fact for the jury, and not of law for the court. What would be reasonably sufficient in one place might be entirely inadequate and insufficient in another, and the extent and character of the inquiries to be made, in the exercise of a reasonable diligence on the part of the carrier, can not be regulated or prescribed by any fixed standard, as the standard must shift with the varying circumstances of each case. The law can not and does not define the measure of duty, making it the same in all cases and under all circumstances, in cases like the present; and, therefore, the question whether the defendant did use proper and reasonable diligence to find the consignee was properly submitted to the jury. *Witbeck v. Holland*, *supra*; *Westchester, &c. R. R. Co. v. McElwee*, 67 *Pa. St.* 311; *Hill v. Humphreys*, 5 *Watts & S. (Pa.)* 123.

The motion for a nonsuit at the close of the plain-

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tiffs' case was properly denied. It had then been proved that the goods had been brought to New York by the defendant as a common carrier, and been put in store; that the plaintiffs, the consignees, had had no notice or knowledge of their arrival or of their storage, and that between the time of their landing in New York and their receipt by the plaintiffs, they had greatly depreciated in value. No attempt had been made to show notice of the arrival of the goods, or that the consignees were unknown, or could not be found.

The doctrine of concurrent negligence has no application to the case. It was several weeks after the landing of the goods from the defendant's steamer on the wharf in New York, that the plaintiffs learned or knew of their arrival, in any view of the evidence, and at that time the goods had become, in a measure, unsalable, and their market value was diminished. From the time the plaintiffs had notice of the arrival of the goods, and that they were subject to their orders, and a reasonable time had elapsed for their removal, they were at the risk of the plaintiffs, and no liability attached to the defendant for subsequent depreciation in value. The concurrent acts of the plaintiffs and defendant could not contribute to the same injury; their duties were not concurrent, but in succession. The defendant's duty was to give the plaintiffs notice, or make due diligence to find them, and until that was done the goods were at its risk; and when the duty was fully performed and the goods put in store, the liability of the carrier ceased, and the risk of loss by depreciation in value was upon the plaintiffs. The duty and liability of the one grew out of the performance of duty by the other.

The defendant gave evidence of all that was done to find the consignees, and the effort made was very slight, and would not have justified the court in

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ruling, as matter of law, that due and reasonable diligence had been used for that purpose. The inquiries made were casual, and no serious attempt was made to find the consignees, or to give them notice of the arrival of the goods. Indeed, on cross-examination, the freight agent of the defendant testified that it was not their custom to give notice to the people in the city, and doubtless the agents and servants of the company acted under a mistake as to the duty and legal liability of the carrier.

There was no question touching the extraordinary liability of carriers in the case. The claim was not against the defendant as an insurer of the safety of the property, but for want of ordinary and reasonable diligence in the performance of a duty resulting by implication from the contract of carriage. The judge, therefore, properly refused to instruct the jury upon the subject of the extraordinary liability of the defendant as a common carrier. As the goods had been shipped from Michigan by railroad, and the plaintiffs had no knowledge that they had been transferred to the defendant at Albany, and were not expecting them by steamboat, there was no occasion for them to be on the lookout for them on the defendant's wharf, or on the arrival of the boats of the company. There was nothing to justify the submission of any question to the jury on this branch of the case. There was no complaint, or reason for complaint, of the manner in which the cause was submitted to the jury, and the verdict is conclusive upon the question of fact.

The judgment must be affirmed.

PECKHAM, J., did not sit.

GROVER, J., did not vote.

Others concurred.

Judgment affirmed.

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HEDGES v. THE HUDSON RIVER RAILROAD COMPANY.

49 *New York*, 228.

Court of Appeals of New York; April Term, 1872.

Carriers. Delivery of goods to consignee. What is a reasonable time for the consignee of goods transported by railroad to remove them after notice of their arrival is given him, is, where the facts are not disputed, a question of law for the court. And if it is submitted to a jury, and their decision is different from what the law determines, the judgment will be reversed.

A consignee of goods transported by railroad is not excused from his duty of removing them within a reasonable time after notice of their arrival, by the pressure of other business. Any time given to other matters, after he receives such notice, can not be allowed to him in determining what is a reasonable time to remove the goods.

Appeal to the court of appeals of New York from the general term of the superior court of the city of New York.

This was an action to recover the value of a quantity of paper, owned by the plaintiffs, which was burned at the defendant's freight station, in the city of New York.

The paper had been shipped to be delivered to plaintiffs at New York city, and arrived at defendant's freight station in that city, on May 23, at 7 A. M. The plaintiffs received notice of its arrival at 9.40 A. M. on May 24. They directed a carman who did their work, to go (after he had delivered a load he was then taking on his truck) to the defendant's station, pay the freight on the paper, and "bring down a *load* of it as quick as you can." The carman started at 10.15 A. M., took five hundred reams, drove back, and unloaded by about 3 P. M. He

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did not return for another load, but for the remainder of the day carted to other places or remained idle.

The plaintiffs gave no further or other directions as to the paper, and made no further effort to get it, or any part of it, away from the defendant's station. The remainder of the paper remained in the car, and in the night of that day and the morning of the following day was burned. The fire was of incendiary origin.

The defendant gave evidence tending to show that two loads more might have been taken away, before 6 P. M., the hour at which defendant ceased to deliver freight.

The court charged that plaintiffs were bound to take away the paper within a reasonable time after notice, and that this was for the jury to decide.

The jury found a verdict for the plaintiffs. The defendant moved for a new trial, and the motion was denied. From the judgment the plaintiffs entered upon the verdict, and the order denying the motion for a new trial, the defendant appealed to the general term, which affirmed both ; and the defendant appealed to the court of appeals.

Philip Jordan, for the respondents.

FOLGER, J.—The defendant remained liable as common carrier of the paper until the plaintiffs had a reasonable time to remove it, after notice of its arrival at the depot in New York city. *Fenner v. Buffalo, &c. R. R. Co.*, 44 *N. Y.* 505. What is such reasonable time is, when there is no dispute as to the facts, a question of law for the court. *Roth v. Buffalo, &c., R. R. Co.*, 34 *N. Y.*, 548.

We do not perceive that there is here any dispute as to the material facts. It is certain that with three or four trucks, all the paper could easily have been hauled away before the close of defendant's business on the day on which one load was taken with one truck. It

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is certain, too, that with the one truck of their own, two loads could have been received by the plaintiffs from the defendant on that day ; so that it was a question of law for the court, whether it was unreasonable for the plaintiffs to employ but one truck ; or if reasonable to employ but one truck, whether it was reasonable to send it but once for paper that day. The learned judge left the question to the jury. In this we think that he erred ; for, though we find no error in the terms of his instructions to the jury, nor in his refusals to charge the requests made by the defendant, yet as the finding of the jury was different from what we hold that the law determines, there was error in committing it at all to the jury, which was injurious to the defendant.

The plaintiffs seek to hold the defendant to a strict liability as insurer of the goods. Asking that so rigid a rule be applied to the defendant, it is just that the plaintiffs, in turn, be held to prompt and diligent action. A consignee can not, after he has notice of the arrival for him of property, defer taking it away while he attends to his other affairs. He may not thus prolong the time during which the carrier shall remain liable as an insurer. That would be to make the carrier a mere convenience for the consignee, without consideration of any kind to the carrier, and yet resting under a great risk. So much time as the consignee after notice gives to his other business, to the neglect of taking charge of his property and removing it from the custody of the carrier, can not be allowed to him in estimating what is a reasonable time for him in which, after notice of arrival, to take delivery of his goods. He is not to be compelled to leave all other business to take his goods from the hands of the carrier. He may attend first to whatsoever demand of his business he deems the most urgent or the most profitable ; but he can not do this at the hazard and expense of the carrier. It is the duty of

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the carrier to give notice of arrival; it is the duty of the consignee, at once and with diligence, to act upon this notice and to seek delivery, and to continue until delivery is complete. Either may neglect this his duty; but then the consequence of neglect must be borne by him.

Now the testimony here without conflict, shows that after the receipt by the plaintiffs of notice of the arrival of this paper, they continued for a space, in attention to other business than taking it from the defendant's charge; and that after one load had been taken, they turned again to other duties. They thus let slip time enough in which to have called for and have received another load. It may be true that this load would not have reached their store before the hour at which they usually closed it; and if it was of importance to them not to vary their habit in this, they could, as they did, refrain from returning to the depot for the second load. It would then have remained, as it did, in the custody of the defendant, who could not have divested itself of the duty to care for it, as bailee thereof. But had the plaintiffs the right, for their own convenience, to put upon the defendant the greater onus of holding it as insurer? There is no justice in compelling the defendant to be the sufferer thereby. There is no justice in it, that the time thus otherwise used by the plaintiffs should not lessen by so much the reasonable space accorded to them for removal of their effects.

We are not compelled, at this time, to hold in this case that the plaintiffs were called upon to employ in the removal of the paper more than the single truck and the two servants with which they ordinarily effected the hauling of matter to and from their store. Circumstances might exist which would require more than this of a consignee.

The respondents suggested that the goods were

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destroyed through the neglect of the appellant. The case was not tried nor hitherto disposed of upon this theory. It would not be just, at this stage of the matter, to determine it on that ground.

For the error at the trial there should be a reversal of the judgment, and a new trial ordered, with costs, to abide the event of the action.

PECKHAM, J., did not vote.

Others concurred.

Judgment reversed.

LONG v. THE NEW YORK CENTRAL RAIL-
ROAD COMPANY.

50 *New York*, 76.

Court of Appeals of New York; June Term, 1872.

Carriers. Special contract for transportation of goods. Where, upon delivery of goods to a railway company for transportation, the shipper takes from the agent of the company a bill of lading, receipt, or other voucher, acknowledging the receipt of the goods, and expressing the purpose for which and the terms upon which they are received, all prior negotiations and agreements between the parties upon the subject are superseded by such formal written agreement; and by it, and it alone, where mistake or fraud is not shown, the duties and liabilities of the parties must be regulated. If the written instrument is complete, making by itself a perfect contract, recourse can not be had to prior parol negotiations to vary its terms.

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Appeal to the court of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action to recover damages from the defendant as a common carrier, for an alleged refusal to deliver certain empty barrels received from the plaintiff at Buffalo, under an agreement to transport and deliver them to plaintiff at New York city.

The facts appearing from the evidence on the trial were, that an agent of the plaintiff, having purchased the empty barrels in question at Buffalo, negotiated with the defendant's agent a contract for their transportation to New York and delivery to the plaintiff there, which, the plaintiff alleged, the agent of the defendant verbally agreed to do at sixty cents per one hundred pounds actual weight. Soon afterwards, the barrels were delivered to the defendant by the former owners of them, who took and sent to the plaintiff a receipt from the defendant therefor, by which the defendant agreed to transport the barrels from Buffalo to Albany, and thence forward them to New York, for "sixty cents per one hundred pounds, at estimated weight." The words "estimated weight," as used, were shown to mean that each barrel was estimated to weigh one hundred pounds; but in fact, the barrels averaged forty pounds each. Defendant transported them to Albany, and thence forwarded them to New York, where plaintiff produced the receipt and demanded the barrels, offering to pay the freight at sixty cents per one hundred pounds, actual weight. The defendants refused to deliver them, unless he would pay sixty cents per barrel.

The court held that the rights of the parties were to be determined by the verbal contract. The evidence as to its terms was conflicting, but the jury found a

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verdict for the plaintiff, and judgment was entered thereon, from which the defendant appealed.

Charles S. Fairchild, for the appellant.

Livingston K. Miller, for the respondent.

ALLEN, J.—There was a conflict of evidence as to the contract for the carriage of the barrels, so far as the same rested in parol, and depended upon the verbal negotiations and understanding of the agents of the respective parties. The witnesses differed widely in their recollection and version of the terms of the proposal made by the one party and assented to by the other; and the disagreement of the witnesses was in respect to the freight, an essential and material part of the agreement. If the rights of the parties depend upon the agreement thus made and consummated by the verbal negotiations of the actors, the verdict of the jury is conclusive upon this branch of the case, and the contract must be assumed to be that which the jury, by their verdict, have found it. The contract is one which is ordinarily reduced to writing before or at the time its performance is entered upon. Goods are seldom transported by common carriers except under an agreement evidenced by a written instrument in some form. The shipper of property, either by land or water, ordinarily takes from the carrier a bill of lading, receipt, or other voucher, acknowledging the receipt of the goods, and the purpose for and the terms and conditions upon which they are received. The evidence in this case accords with what, from experience, may almost be assumed to be the universal custom of common carriers, to wit, that freight is always carried by this defendant under a written contract. The evidence is that at the time the barrels were received by the defendant a receipt was given to the

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party delivering them, expressing the terms of the contract, and that this receipt was presented by the plaintiff at the time he demanded the property. The property was delivered to and the receipt or contract accepted by the party representing the plaintiff, who at the time requested the defendant's agent to take it at a lower rate, which was refused. This testimony on the part of the defendant is unexplained and uncontroverted by the plaintiff. The verbal contract was merged in the written agreement, and the latter must be taken as the evidence, and the sole evidence, of the final and deliberate agreement of the parties. If it did not embody truthfully the terms of the agreement as actually made, the plaintiff or his agent should not have received it or assented to the carriage of the property under it; if accepted by the agent by mistake, that fact should be shown. But at the time of the receipt of the goods, and the delivery of the shipping receipt or contract for the carriage, the parties were in a situation to correct any mistake or misunderstanding as to the terms of the verbal agreement, and definitely adjust its terms. The one could retain his property or ship by some other carrier, and the other could refuse to accept the goods for carriage except upon such terms as should be agreed to. All prior negotiations and agreements were superseded by the formal written agreement; and by it, and it alone, in the absence of mistake or fraud, the duties and liabilities of the parties must be regulated.

Instead of relying upon the oral agreement of the defendant's agent, the plaintiff has elected to take the express written agreement of the party; and this agreement is perfect as a contract for the carriage of the goods, embracing all essential particulars. The rule that when a contract is reduced to writing, recourse must be had to the instrument to ascertain its terms, and that resort can not be had to prior negotiations to

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vary its terms, and that everything resting on parol becomes thereby extinguished, was applied to a contract for the sale of a ship in *Mumford v. McPherson*, 1 *Johns. (N. Y.)* 414; to a bill of lading in *Creery v. Holly*, 14 *Wend. (N. Y.)* 26; to a charter of a vessel in *Renard v. Sampson*, 12 *N. Y.* 561; and to a contract for grading and paving streets in *Riley v. Brooklyn*, 46 *N. Y.* 444. The rule was recognized in *Bostwick v. Baltimore, &c. R. R. Co.*, 45 *N. Y.* 712; but the case was taken out of the rule by the fact that the goods had been actually shipped under the verbal agreement, and the written agreement, or bill of lading, was sent to the shipper one or two days after the property had been shipped, and after the owner had lost the control of the goods and was in no situation to object to its terms. *Renard v. Sampson, supra*, is cited with approval in other cases which have been held not within the rule, for the reason that the part of the contract still resting in parol was separable and distinct from that part which had been reduced to writing. *Witbeck v. Waine*, 16 *N. Y.* 532; *Barber v. Bradley*, 42 *N. Y.* 316. Here the contract was entire, and the written instrument was complete, making by itself a perfect contract, and was delivered and accepted by the plaintiff's agent, at the time of the receipt of the goods by the defendant; and there are no circumstances in the case, as made, to authorize a resort to the prior verbal negotiations or agreement by the parties. The court held on the trial that the verbal contract was that by which the rights of the parties were to be determined, and the verdict passed against the defendant upon that ruling and the terms of the contract as it vested in parol and was found by the jury. This was erroneous, and entitles the defendant to a reversal of the judgment. By the parol contract, as claimed by the plaintiff, and as found by the jury, the barrels were to be carried at a specified rate per hundred pounds actual weight; while, by the written

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contract, they were to be carried at the same rate "at estimated weight"; and the defendant proved that "estimated weight," as used in the contract, meant that each barrel was estimated to weigh one hundred pounds. That this was the true meaning of the term, as there used, was not controverted upon the trial. The contest was as to which contract should govern, the verbal or the written, and the plaintiff prevailed in excluding the written and establishing the verbal agreement as the contract of the parties. For this error the judgment must be reversed.

Other questions of more or less importance and difficulty are presented ; but as the facts may be essentially varied upon another trial they are not considered.

The judgment should be reversed and a new trial granted.

All concurred.

Judgment reversed.

PENN v. THE BUFFALO & ERIE RAILROAD
COMPANY.

49 *New York*, 204.

Court of Appeals of New York ; April Term, 1872.

Carriers. Contract limiting liability for loss or damage. A railroad company transporting property under a special agreement limiting its liability, occupies the position of a private carrier for hire, and is only liable for the performance of the duty undertaken according to its terms, or for some wrongful act, either willful or negligent.

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By the terms of a special agreement for the transportation of cattle by railroad, between two points named, the owner of the cattle assumed all risk of injury to them "from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars," and the owner was to load and unload them at his own risk, the railroad company to furnish the necessary laborers to assist. An agent of the owner was to ride free, and take charge of the cattle. The train carrying the cattle was detained at an intermediate station three days by a snow storm, during which trains could not be moved with safety. The cattle could have been unloaded by constructing a platform for the purpose, but this the agent of the railroad company declined to do. In consequence of the delay, some of the cattle died and others were injured. *Held*, that under the contract no duty devolved upon the railroad company other than to transport the cattle in a proper car, safely, and with reasonable dispatch. Whatever was required to be done to prevent injuries from unavoidable delays was to be done by the owner or his agent in charge. The provision for unloading referred to the terminus, and not to an intermediate station; and the injury being attributable to the neglect of the owner's agent to unload the cattle, the railroad company was not liable.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover damages for injuries to cattle owned by the plaintiff while in course of transportation over the defendant's road.

A special contract as to the transportation was entered into by the parties, some of the provisions of which were as follows :

"The said party of the second part (plaintiff) does hereby agree to take, and hereby does assume all and every risk of injuries which the animals or either of them may receive, in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming, or killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of the said railroad companies,

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or on account of being injured by the burning of hay, straw, or any other material used by the owner for feeding the stock or otherwise, and for any damage occasioned thereby, and also all risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from or in the loading or unloading said stock.

“And it is further agreed that the said party of the second part is to load and unload said stock at his own risk, the said railroad companies furnishing the necessary laborers to assist under the direction and control of said party of the second part, who will examine for himself all the means used in the loading and unloading, to see that they are of sufficient strength and of the right kind, and in good repair and order.

“And the said party of the second part, for the consideration aforesaid, hereby releases and agrees to release and to hold harmless and keep indemnified the said party of the first part of and from all damages, actions, claims, and suits on account of any and every the injuries, loss, and damage hereinbefore referred to, if any such occurs or happens.”

In pursuance of this contract, the plaintiff delivered several car loads of cattle to the defendant, to be carried from Erie, Pa., to Buffalo, N. Y. While on the way a heavy snow storm began, and continued three days, during which time railroad trains could not be safely moved. The train carrying the plaintiff's cattle was stopped at Dunkirk. Soon after arriving there, plaintiff's agent, in charge of the cattle, requested defendant's agents to unload them; but the usual place for unloading cattle was occupied by another train, and they could only have been unloaded where they were, by constructing a temporary platform. They were detained in the cars until the next day, and, when taken out, three were dead and others injured.

The court instructed the jury that the contract ex-

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empted the defendant from liability to pay for any damages arising from the delay in transporting the cattle, and from their detention at Dunkirk; that the defendant was, however, liable for the damages sustained by the cattle while delayed at Dunkirk, provided they found from the evidence that the defendant was requested, by the agent of the plaintiff, to unload the cattle there, and could have unloaded them by the exercise of due diligence, in time to have prevented the damages complained of; that, if such request was made, the defendant was thereafter bound to unload the cattle there, provided they could have been unloaded by the exercise of due diligence. To this part of the charge the defendant excepted.

The plaintiff's agent, who had charge of the cattle and was with them at Dunkirk, testified he could have unloaded the cattle there where they stood, but that it was not his business to do it. The defendant's counsel asked the court to instruct the jury that the plaintiff, for that reason, could not recover. The court declined to so instruct the jury, and the defendant's counsel excepted.

The defendant's counsel then requested the court to instruct the jury that the plaintiff, under such circumstances, could not recover any damages that would have been prevented if he had unloaded the cattle himself. The court refused to so instruct the jury, and the defendant's counsel excepted.

The jury rendered a verdict in favor of the plaintiff. The defendant moved for a new trial, which was denied. The defendant appealed to the general term from the judgment for the plaintiff entered on the verdict, and from the order denying a new trial. Both were affirmed, and the defendant appealed to the court of appeals.

A. P. Laning, for the appellant.

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If the plaintiff's own negligence or omission of duty contributed to the injury he can not recover. *Smith v. Smith*, 2 *Pick. (Mass.)* 621 ; *Brownell v. Flager*, 5 *Hill (N. Y.)* 282. The court should have instructed the jury that the plaintiff could not, under such circumstances, recover for any damages that would have been prevented if he had unloaded the cattle himself. *Loker v. Damon*, 17 *Pick. (Mass.)*, 284 ; *Hamilton v. McPherson*, 28 *N. Y.* 72, 76 ; *Miller v. Mariners' Church*, 7 *Greenl. (Me.)* 51.

Benjamin H. Williams, for the respondent.

Defendant was chargeable with actual negligence unless it exercised the care and prudence of a prudent man in his own affairs. *Express Co. v. Kountze*, 8 *Wall.* 342 ; *The Niagara v. Cordes*, 21 *How.* 7.

As to whether such care and prudence were exercised by the company, was a question of fact for the jury. *Beers v. Housatonic R. R. Co.*, 19 *Conn.* 566 ; *Munroe v. Leach*, 7 *Metc. (Mass.)* 274 ; *Baxter v. Second Avenue R. R. Co.*, 30 *How. (N. Y.) Pr.* 219 ; *Aymar v. Astor*, 6 *Cow. (N. Y.)* 266 ; *Ernst v. Hudson River R. R. Co.*, 35 *N. Y.* 9.

The jury having found negligence, defendant can not claim exemption from liability under the contracts, as the contract does not relieve from negligence or want of care. *Kountze v. Express Co.*, 8 *Wall.* 342. The same doctrine has been held in other cases. *Gillaume v. Hamburg, &c. Packet Co.*, 42 *N. Y.* 212 ; *Prentice v. Decker*, 49 *Barb. (N. Y.)* 21 ; *Stedman v. Western Trans. Co.*, 48 *Id.* 97 ; *Perkins v. N. Y. C. R. R. Co.*, 24 *N. Y.* 196 ; *Smith v. N. Y. C. R. R. Co.*, 24 *Id.* 230 ; *Wells v. Steam Nav. Co.*, 9 *N. Y.* 375 ; *Sager v. P. S. & B. R.*, 31 *Me.* 238.

ALLEN, J.—The liability of a common carrier of

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animals is essentially different from that of a carrier of merchandise or other inanimate property. While common carriers are insurers of inanimate property against all loss and damage except such as is inevitable or caused by public enemies, they are not insurers of animals against injuries arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care. *Clarke v. Rochester, &c. R. R. Co.*, 14 *N. Y.* 570 ; *Michigan Southern, &c. R. R. Co. v. McDonough*, 21 *Mich.* 165 ; *Angell on Carriers*, § 214 *a.* But for the special agreement under which the plaintiff's cattle were transported, there would be but little doubt as to the defendant's liability for the damages caused by the want of proper care while detained at Dunkirk. Ordinary care and attention to the cattle during the delay would have prevented the injury. The liability of the defendant is, however, to be determined by the agreement of the parties. The railroad company, by reason of the written contract, occupied the position of a private carrier for hire, and is only liable for the performance of the duty undertaken according to its terms, or for some wrongful act, either willful or negligent. The agreement furnishes the extent of liability, unless a loss has occurred from the willfulness or negligence of the carrier. *Farnham v. Camden, &c. R. R. Co.*, 55 *Pa. St.* 53 ; *Colton v. Cleveland, &c. R. Co.*, 67 *Id.* 211 ; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 344 ; *Angell on Carriers*, §§ 225, 226 ; *Dorr v. New Jersey Steam Nav. Co.*, 1 *Ker.* 485.

The plaintiff assumed all risks of injuries which the animals might receive "from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars," and also all risk of loss or damage in loading and unloading ; and the agreement provided that the plaintiff should load and unload the stock at his own risk, the defendant furnishing assist-

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ance as required. By another clause in the agreement, an agent of the owner was to ride free, and to be with the train to take the care and charge of the stock, and D. W. Barron is named as passed free in charge of the stock. The case states that it was proved on the trial "that the said cattle were in the charge of D. W. Barron as the agent of the plaintiff, and he accompanied them on the cars from Kentucky to Buffalo."

The provision in the contract for loading and unloading the cattle had respect to the terminus of the transportation, and not for loading and unloading at any intermediate station. There is no claim that the detention at Dunkirk was occasioned by the willful or negligent conduct of the defendant or its servants, or that the cattle were not carried to their destination as soon as they could have been, with reasonable diligence. The loss resulted from the delay, and in consequence of "heat and suffocation, and being crowded upon the cars." The loss was within the terms of the contract, and to be sustained and borne by the plaintiff, unless caused by the willful act or neglect of the defendant.

The cattle were in charge and under the care of the plaintiff's servant and agent. No duty was devolved upon the defendant other than to transport them in a proper car, safely, and with reasonable dispatch. The carrier did not undertake to look after the cattle or care for them, to water or feed them, or to guard against any of the necessary consequences resulting from delays or detention on the route. Whatever was required to be done to prevent injuries and loss arising from such causes was to be done by the owner, or his servant in charge of the cattle. The agent of the plaintiff testified that he could have arranged planks and taken the cattle from the cars, and thus prevented the injury, and did not because it was not his business. Had he undertaken to remove the cattle from the cars

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and been prevented by the defendant, or its servants and agents, and loss had ensued, the defendant would have been liable. The recovery was had upon the ground that it was the duty of the defendant's agents, upon request of the plaintiff's agent, to have unloaded the cattle at Dunkirk, if it could have been done by the exercise of reasonable care and diligence, and the jury were instructed to this effect. This was placing the responsibility of the care of the cattle upon the carrier instead of the owner. If, as the case shows, the cattle were in charge of and under the care of the servant and agent of the owner, the defendant was not chargeable for neglect of duty in not unloading them or taking any other care of them necessary for the prevention of injury or loss. The duty of the defendant had respect to the transportation of the cattle, and not the care of them while *in transitu*.

Again, this case falls within the general principle that he who seeks to recover damages which have resulted from the negligence of another, must himself be free from negligence contributing to the injury. The plaintiff's agent in charge of the cattle could have prevented all loss by himself removing the cattle, and his omission to do so, under the circumstances, was a negligent omission of duty, directly contributing to the injury. If the agent of the owner had not been with the cattle to take care of them, the duty would have been upon the defendant to do what was necessary to guard against loss and damage during the detention; that is, to use proper diligence and care in looking after the cattle. *Clark v. Rochester, &c. R. R. Co., supra; Hamilton v. McPherson, 28 N. Y. 72.*

The direct cause of the injury was the want of proper care of the cattle at Dunkirk, and is upon the evidence attributable to the plaintiff's agent. If there

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was any obstacle interposed by the defendant to the unloading of the cattle, it should have been shown.

The judgment must be reversed, and a new trial granted.

CHURCH, Ch. J., FOLGER, and RAPALLO, JJ., concurred.

GROVER, J., concurred in the result, upon the ground that the exception to the refusal of the judge to charge as requested, as to the duty of the person in charge of the stock to unload them, was well taken.

PECKHAM, J., dissented.

Judgment reversed.

THE MICHIGAN SOUTHERN & NORTHERN
INDIANA RAILROAD COMPANY v. HEATON.

87 *Indiana*, 448.

Supreme Court of Indiana ; November Term, 1871.

Carriers. Contract limiting liability for loss of goods. A railroad company can not, by contract, relieve itself from liability for the loss of goods delivered to it, as a common carrier, for transportation, if the loss is occasioned by the negligence of itself, its agents, or servants, or if such negligence has in any degree contributed to the loss. A common carrier, and especially one exercising and enjoying corporate franchises, granted for a public purpose and for the public benefit, can not be permitted to so far disregard its duty

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to the public as to stipulate for any degree of negligence in the discharge of such duty.

Hence, where property is received by a railroad company for transportation, under a contract providing that the company is not to be held responsible for any damage by fire, this provision does not relieve the company from its responsibility, as a common carrier, for any damage by fire caused by its own negligence or want of care.

Appeal to the supreme court of Indiana from the court of common pleas of St. Joseph county.

This was an action to recover the value of a quantity of wheat delivered by the plaintiff to the defendant, to be transported over the defendant's railway, and which was destroyed by fire while in the possession of the defendant, and before being transported as agreed. The facts of the case appear from the opinion. The jury found a verdict for the plaintiff, upon which judgment was entered, and from this judgment the defendant appealed.

J. B. Niles, W. Niles, and J. O. Norton, for the appellant.

J. H. Baker, J. A. S. Mitchell, W. A. Woods, and J. D. Arnold, for the appellee.

WORDEN, Ch. J.—This case comes before us on a bill of exceptions, showing the following facts: "It was proven or admitted that the defendant is a common carrier, as stated in the complaint, and that the plaintiff delivered to the defendant, at its station in Bristol, Indiana, nine hundred and twenty-seven $\frac{1}{2}$ bushels of wheat, of the value of two dollars and three cents per bushel, to be transported to Toledo, in the State of Ohio, and that on the 12th day of September, 1867, the same was, together with the warehouse, consumed by fire. At the proper time, the defendant gave evidence proper to be submitted to the jury tending to

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prove the following facts, to wit: That said wheat was received by the defendant at said warehouse for such shipment under a special contract contained in the bill of lading, a copy of which is set forth in the complaint, and in the third paragraph of the answer, and which contains, among other things, the following clause, to wit: 'This company shall not be held liable for any delay in the transportation or delivery of said grain, or for any injury from heat or dampness, or for any deterioration in quality, or loss by fire, or accident, or shrinkage, while in possession of the company;' and that the defendant used care and diligence in guarding said wheat from damage or loss by fire. And evidence was also given by the plaintiff tending to prove want of care and diligence on the part of the defendant in guarding said wheat against loss by fire, but the case was so left by the evidence that the extent or degree of such care, or the want of it, was a question for the consideration of the jury." And thereupon the defendant asked the following instructions, which were refused:

"First, if the jury find, from the evidence, that the wheat in controversy was received by the defendant for shipment only under the terms and conditions mentioned in the receipts or bills of lading set forth in the complaint and in the answer, and which have been given in evidence, then the defendant is to be held liable in regard to the wheat only to the same extent as a private carrier for hire would be, and not as a common carrier; that is to say, in such case, the defendant was bound only to use such diligence in guarding the wheat against danger of loss by fire as any prudent man commonly uses to save his own goods from loss by fire. It (the defendant) was required to use in regard to the same only ordinary diligence, and the defendant can be held liable only for the want of that degree of care, and not for the extraordinary care required of common carriers.

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“Second, if the jury find, from the evidence, that the wheat in controversy was received by the defendant for shipment only under the conditions mentioned in said receipt, and that such conditions were at the time understood and assented to by the plaintiff, then the defendant, as to guarding the wheat against loss by fire, was not bound to use extreme care or diligence, such as is ordinarily required of common carriers, but was bound to use only that degree of care and diligence in that respect which ordinarily prudent men commonly exercise in regard to their own affairs of similar character, and is liable only for the want of that degree of care.”

The court gave the following charge :

“This is an action brought against the Michigan Southern & Northern Indiana Railroad Company as a common carrier, for the value of a quantity of wheat delivered to them to be carried from Bristol to Toledo. The wheat was stored in the warehouse of the company for transportation, but before it was moved forward, the building with its contents was destroyed by fire. The railroad company as a common carrier are regarded by the law as insurers of the property intrusted to them, and are legally responsible for acts against which they could not provide, from whatever cause arising, the acts of God and the public enemy only excepted. The loss or damage to property in their possession to be carried, is, of itself, sufficient proof of negligence—the rule of law being, that everything is negligence which the law does not excuse—so that in all cases but those just mentioned as excepted, their faultlessness is no discharge. This responsibility of a common carrier may, however, be limited by contract. In this case, it is stipulated between the parties that the defendant is not to be responsible, among other things, for any loss by fire ; but this general provision in the contract does not relieve the defendant from its responsibility as a com-

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mon carrier, if the loss by fire was caused by negligence or want of care on its part. So that if the jury find, from the evidence before them, that the property mentioned in the complaint was lost or destroyed by the want of care or negligence of the defendant, they will find for the plaintiff the value of the property lost or destroyed. But if the property, while in the warehouse, was not destroyed in consequence of its want of care or negligence, you will find for the defendant."

The following second charge, on this point, was given at the request of the plaintiff :

"2. Notwithstanding the limitation of the company's liability for loss by fire contained in the receipt given, still the company is liable for a loss by fire if there was carelessness or negligence of the company or its employes in connection with the fire and contributing to the loss."

The appellant duly excepted to the rulings of the court in charging and in refusing to charge as asked.

The question is presented by the record, arising out of the charges given and those refused, whether a common carrier is exempted, by such special contract, from liability for the loss of goods by fire, where the loss has been occasioned by any degree of negligence on the part of the carrier which has contributed to the loss.

The counsel for the appellant do not claim that the carrier would be exempt from liability for a loss by fire occurring from the gross carelessness, or want of ordinary care, on the part of the carrier or his agents or servants ; but they claim that the carrier, under such a contract, is only bound to use such degree of care in guarding the property against loss by fire as ordinarily prudent men would use under such circumstances : in other words, such care as the law requires of an ordinary bailee, or private carrier for hire.

The appellee, on the other hand, claims that the carrier, under such contract, is liable for the loss of the

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goods by fire, where the loss has occurred through any degree of negligence on the part of the carrier, his agents, or servants, which has contributed to the loss. We think it must be regarded as settled by the numerous authorities on the subject, that a common carrier may, by special contract, relieve himself to some extent from the strict liability which the law imposes upon him as such common carrier. *York Company v. Central Railroad*, 3 *Wall.*, 107. But while this is the case, we are of opinion that a common carrier can not, by contract, relieve himself from liability for the loss of goods delivered to him for transportation, which loss has been occasioned by his own negligence or that of his agents or servants, or where such negligence has in any degree contributed to the loss. And it matters not what degree of negligence has thus occasioned or contributed to the loss. A carrier can no more stipulate for a slight degree of negligence than he can for gross negligence. A common carrier, and especially one exercising and enjoying corporate franchises, granted, as is supposed, for a public purpose and for the public benefit, can not, in our opinion, be permitted to so far disregard the duty which he or it owes to the public, as to stipulate for any degree of negligence in the discharge of duty as such common carrier. It is not simply a question between the carrier and the single individual with whom the contract is made. It is a question of public interest on the one hand, and public duty on the other. If such contract can be made and is to be held valid in one instance, it follows that if made in all cases, it must be held valid in all cases. The carrier may thus force these terms upon the shipper, who must either accept them or forego the transportation of his goods by means of the common carrier, or resort to his action against the carrier for refusing to transport his goods without such stipulations, which practically would be an inadequate

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remedy, rather than resort to which, the shipper would generally submit to the carrier's terms. The common carrier may thus divest himself of that character, and force the public, through its necessities, to intrust the transportation of goods to carriers irresponsible for negligence.

The case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 344, is relied upon by the appellant as establishing that under such contract the appellant would only be liable for gross neglect or want of ordinary care. We do not think it clear that the case establishes the position assumed. William F. Harnden had shipped on the steamboat *Lexington*, to be transported from New York to Stonington, in Connecticut, a quantity of coin. On the way, a fire broke out which destroyed the boat, and the money was lost. The court state the agreement under which the coin was to be transported, as follows: "The special agreement in this case, under which the goods were shipped, provided that they should be conveyed at the risk of Harnden; and that the respondents were not to be accountable to him or to his employers, in any event, for loss or damage."

The court say: "If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents, in the transportation of the goods, it should be required to be done, at least, in terms that would leave no doubt as to the meaning of the parties." Why was the court speaking of gross negligence? Simply because it was a case of gross negligence with which it had to deal. There was no question whether a less degree would have been sufficient to render the respondents liable. The court was speaking of the case as it existed, and as one of gross negligence. This is clearly shown by what is said, on page 385, on the subject. It is there said:

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“We think there was great want of care, and which amounted to gross negligence, on the part of the respondents, in the stowage of the cotton,” &c.

The following paragraph, on same page, would seem to indicate that if there was any fault on the part of the respondents, they would be liable :

“It is, indeed, difficult, on studying the facts, to resist the conclusion, that, if there had been no fault on board in the particulars mentioned, and the emergency had been met by the officers and crew with ordinary firmness and deliberation, the terrible calamity that befell the vessel and nearly all on board would have been arrested. We are of opinion, therefore, that the respondents are liable for the loss of the specie, notwithstanding the special agreement under which it was shipped.”

The same court, in the case of *The New World v. King*, 16 *How.* 469, seemed inclined, for some purposes, at least, to repudiate all distinctions in the degrees of negligence, as ordinarily classified. Mr. Justice CURTIS, in delivering the opinion of the court, remarks : “The theory that there are three degrees of negligence, described by the terms slight, ordinary, and gross, has been introduced into the common law from some of the commentators on the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield, until there are so many real exceptions that the rules themselves can scarcely be said to have a general operation. . . . If the law furnishes no definition of the terms gross negligence, or ordinary negligence, which can be applied in practice, but leaves it to the jury to deter-

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mine, in each case, what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned."

We, however, do not wish to be understood as deciding that in no case does the distinction in the degrees of negligence exist.

The case of *Graham v. Davis*, 4 *Ohio St.* 362, very fully sustains the view which we take of the question before us. We quote the following paragraph from the opinion of the court in that case, delivered by Judge RANNEY:

"The whole may be summed up in this: the carrier, by agreement with the owner, may exonerate himself from responsibility for losses, arising from causes over which he has no control, and to which his own fault or negligence has in no way contributed. But in doing so, he does not cease to be a common carrier, nor in any manner change his relation to the public as such; and he can only excuse himself for a failure to deliver the goods intrusted to him by showing that, without his fault, he has been prevented by some one of the causes recognized by law, or specifically provided for in the contract. This case requires very little to be added, as to the degree of care exacted of the common carrier. We have already said, that he is not at liberty to stipulate for any degree of negligence, and that a loss from negligence can not be within the stipulated exceptions to his liability."

The case of *Steinweg v. Erie R. Co.*, 43 *N. Y.* 123, is directly in point. There the bill of lading released the carrier from liability for damage or loss by fire or explosion of any kind. It was held that the carrier was not released from liability for damage by those means, resulting from his own negligence. And it was held that the carrier, a corporation, "was liable, if

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there was negligence on its part, without regard to any supposed distinctions or degrees of negligence.”

This is the doctrine of the supreme court of the United States, also, as is to be inferred from what is said in the case in 3 *Wall.* above cited. There Mr. Justice FIELD, in delivering the opinion of the court, after having made a very clear statement of the duties and responsibilities resting upon common carriers, proceeds as follows: “The owner of goods may rely upon this responsibility imposed by the common law, which can only be restricted and qualified when he expressly stipulates for the restriction and qualification. But when such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement.” Had it been the intention of the court to discriminate between different degrees of negligence, and to hold that some could and some could not be contracted for by the carrier, they would not have used the general term negligence, which includes all classes, whether slight or gross, as expressive of what could not be contracted for.

There may be, and probably are, some cases, as well as some *dicta*, in the books, at variance with the doctrine on which we stand in this case; but we are satisfied that it is in accordance with principle, and is supported by very respectable, if not the great weight of authority.

Effect can be given to the clause in the bill of lading stipulating that the company shall not be liable for any loss by fire or accident. By the law, independently of any contract providing otherwise, the carrier is chargeable for all losses except such as may be occasioned by the act of God or the public enemy. He insures against all accidents which result from human agency, although occurring without any fault or neglect on his part. Had the wheat been lost by fire

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without any negligence on the part of the company, the clause in the bill of lading would, doubtless, have exempted the company from the liability therefor, which the law would otherwise have imposed.

We are of opinion that the court committed no error, either in giving or withholding charges, and that the case went to the jury on the correct theory of the law.

Judgment affirmed, with costs, and five per cent. damages.

THE EAST TENNESSEE & GEORGIA RAIL-
ROAD COMPANY v. MONTGOMERY.

44 Georgia, 278.

Supreme Court of Georgia; July Term, 1871.

Carriers. Contracts for transportation of goods. Connecting lines.

The superintendent of the defendant, a railway company, in answer to inquiries by B., wrote B. a letter stating that arrangements were perfected for sending cotton through to New York by the defendant's railroad and connecting lines, without detention; the letter also gave the rate of freight to New York, and expressed the hope of securing a liberal share of business. This letter was shown by B. to M., who thereupon shipped a quantity of cotton to New York by the defendant's road and connecting lines, as described in the letter. After passing over the defendant's line, and while in the possession of a subsequent carrier, it was delayed, and during the delay the price of cotton declined. In an action by M. to recover from the defendant his damages caused by the decline,—*Held*, that the letter to B., shown by him to M., and acted on by the latter, did not, without notice by M. to the defendant that he had shipped his cotton under the terms of the letter, constitute an express contract for transportation of M.'s cotton, making the

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defendant liable for delay occurring beyond the terminus of its own line.

Under a statutory provision that "if there be several connecting railroads, and goods be intended to be transported over more than one road, such road shall only be liable to its own terminus and until delivery to the next connecting road" (*Ga. Code*, § 2058), the receipt of goods by a railroad company intended to be transported over several roads, even on a through rate to be paid at the end of the route, and the giving a written receipt to that effect for such goods, does not constitute an express contract binding the receiving company for the whole distance.

Error from the supreme court of Georgia to the superior court of Whitfield county.

This was an action to recover damages resulting from delay in the transportation of cotton shipped by the plaintiff over defendant's railroad, and delivered by the defendant in good order and in due time to the succeeding carrier. The facts are stated in the opinion. The jury found a verdict for the plaintiff. The defendant moved for a new trial on the ground that the verdict was contrary to the evidence, and upon other grounds which were not considered in the supreme court. The new trial was denied, and judgment entered on the verdict. The defendant prosecuted a writ of error, assigning as error the refusal of a new trial.

D. A. Walker, and *McCutchen & Shumate*, for the plaintiff in error.

Printup & Fouche, and *W. H. Dabney* for the defendant in error.

LOCHRANE, Ch. J.—James Montgomery brought his action against the East Tennessee & Georgia Railroad Company, to recover damages resulting from the delay in transportation of cotton from Rome to the city of New York. The damages proven and found by the jury amounted to two thousand dollars. Upon

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a motion for a new trial various grounds were assigned, all, however, controlled by legal principles involved in the construction of a letter set up, with the surrounding facts, as an express or special contract, upon which the liability of the defendant below is predicated.

The proof shows that Montgomery shipped the cotton from Kingston, Georgia, at a station on the Western & Atlantic Railroad, consigned to parties in New York. The cotton was received in due course at Dalton, by the East Tennessee & Georgia Railroad, and was, by them, transported over their line to their terminus at Knoxville, and, as in good order and in due time, delivered to the connecting road *en route*, or the East Tennessee & Virginia Railroad Company. The delay occurred after it left the custody of the defendant and its delivery to the connecting road. Under our Code, section 2058, defining the liability of railroads, this defendant was liable only to its terminus, and for the delivery of the property to the connecting road in good order. But the difficulty of this case, if any exists, originates in the fact that A. A. Talmadge, superintendent of the East Tennessee & Georgia Railroad Company, on October 25, 1865, and previous to the shipment, addressed a letter to Mr. Bayard, of Rome, in which letter he says: "Yours of the 21st came duly to hand. In reply, I will say that arrangements are perfected for sending cotton through to New York *via* East Tennessee & Georgia and connecting lines, to Alexandria by rail, and from thence, by steamer, without detention, and with less transfers than any other line. There are three regular lines of steamers running from Alexandria to New York, so that there will not be any detention at that point. Our rate from Dalton to New York on cotton is nine dollars (\$9 00) per bale. Hoping to secure a liberal share of business from Rome, I am, &c.,

"A. A. TALMADGE, *Superintendent.*"

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This letter was shown or read to Montgomery, and he, acting upon it, sent his cotton from Rome to Kingston, at which latter point it was forwarded through as freight. Did this letter constitute an express contract, by which the general liability of the East Tennessee & Georgia Railroad was increased as to Bayard, the party to whom it was addressed? I think it did. It contained a proposition in writing to transport cotton to New York. This was its fair purport of construction. It presented inducements to secure the shipments. It was addressed to him, and when accepted by him, either by a response in writing or by acts equivalent, as by shipment of his cotton, my opinion is it was an express contract upon the part of the road, and accepted by him, to carry his cotton to New York, and I think the railroad company, taking the benefits under it, would be, in law, justly bound by its terms. But, conceding this proposition, did the reading of this letter to Montgomery make the defendant occupy, as to him, the same legal *status* or relationship? I think not. It is true, the letter concludes by hoping to receive patronage from Rome; but this could not fairly be held to constitute a contract for carriage with any party in Rome who may have seen, read, or heard read this letter. Therefore, in itself, it did not constitute any contract between a stranger and the railroad company. What other proof is developed by the record to aid in giving to this letter that effect? Montgomery acted upon it by sending his cotton *en route* over that road, and by the line indicated. This is all. But Montgomery, in acting upon it, delivered his cotton to the railroad at Kingston, and from that point it went over the East Tennessee & Georgia Railroad, as any other freight, and, consequently, did not come within any notice or knowledge of the railroad company, that it was shipped by express contract with them, invoking their attention further than over their own line and to

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the connecting line at their terminus, receiving it "as in good order." Therefore neither the *seeing* of the letter, nor the mode of shipment, constituted an express contract as between the railroad company and Montgomery. The link which is absent and nowhere seen by the evidence, is notice by Montgomery of the shipment, as included in the terms of the letter to the railroad company. If Montgomery, being advised of this letter, and properly construing its terms to be a proposition to ship through to New York by connecting lines, and inviting shippers from Rome to patronize it, upon such terms, had notified the East Tennessee & Georgia Railroad that he had so shipped to them, under the proposition contained in the letter to Bayard, then, by this notice to them, he would have been entitled to claim the damages occasioned by the delay upon the line, even though accruing after it left the hands of the defendant and was delivered to connecting lines.

It is useless to discuss the doctrine of railroad liability by express contract. This I did in cases at the last term. I simply, in this case, confine myself to the facts and the opinion I entertain upon them as to whether this letter, under the evidence, constituted an express contract. And, with the view I hold, it is unnecessary to travel through the various assignments of error to the charges of the judge. I think the law of the case entitled the party to a new trial upon the main and controlling ground in the case.

In relation to the judgment of the court refusing to strike out the interrogatories of Montgomery, only so far as they related to memorandums not attached, I am of opinion the decision was correct. Under section 3835, all exceptions to the execution must be made in writing, and notice given before the trial, when the interrogatories have been in office, &c., and when a witness answers from memoranda, under section 3831,

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such memoranda should be sent with the commission and certified to by the commissioners. These objections were made upon the trial, and the defect went to the execution, and when made upon the trial, the ruling of the court accomplished substantial justice, by rejecting the questions improperly answered, but receiving that not subject to the objection.

MCCAY, J.—I concur in the judgment of reversal in this case. I think the charge of the court was error. In my judgment, there was no evidence of any contract of the East Tennessee & Georgia Railroad to carry this cotton to New York, and it was error to charge the jury that they might consider from the letter and from Montgomery's acts, whether there was an undertaking so to do. The charge also informed the jury that though the letter was not, of itself, evidence of such a contract, it was evidence that the road was then making such contracts and doing such business. In the first place, I am inclined to the opinion that, under our law, this letter was not even an offer to Bayard, by this road, to carry his cotton to New York. Fairly construed, what does this letter amount to? Simply this, that an arrangement had been made between the different connecting lines to carry cotton through from Dalton to New York, without detention, for nine dollars per bag. By the law of England, and by the decisions of the courts of most of the American states, it is true that a receipt of freight, destined to a distant point, binds the receptor, who is a common carrier, to its destination, and especially is this true, if the freight be agreed to be paid in advance or at the end of the line.

But our Code, section 2058, provides that "if there be several connecting railroads, and goods be intended to be transported over more than one road, such road shall only be liable to its own terminus and until

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delivery to the next connecting road." At our last term, this court decided in the case of Western & Atlantic Railroad v. McDonald & Strong, that the mere receipt of goods destined to a distant point, and stated in the receipt as intended to be transported over several roads, even on a through rate, was not, under this section of the Code, such a contract as bound the receipting road for the whole distance. We then held that this section of the Code contemplated just such a case, and that the putting of the intention into writing did not alter the law. If goods are intended to pass over different roads, and be delivered by one road to the other, it must be that the freight over the whole line is to be paid at one end of the line; since, if this were not done, the goods must stop. I do not think there is anything in this letter, even as to Bayard, to make this case different from the case I have referred to. It is, at last, nothing but a statement in writing of the very case put by the Code, to wit: there are several connecting roads, the goods are to be transported over more than one road, and to be delivered direct from one road to the next without any intermediate consignee or agent to pay the freight and tranship the goods. Nor does the use of the word "our" in the letter make the case different. Very clearly, the writer means by that word our, not his road, but all the roads.

But admitting that, as to Bayard, this letter, if he acted under it, was a special contract, is it a special contract as to Montgomery, if he acted upon it?

Now, I do not say a special contract must always be by words on both sides. One may say I will do so and so, if you will do so and so. If the person addressed acts, and lets the other know he has acted, this is the same as if he had agreed in words. What is the case here? Montgomery sees the letter; it was not addressed to him; he acts upon it and starts his cotton

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from Rome, destined to New York. He gives no notice that he has acted. He never deals with this road at all. The cotton comes to this road under a list or freight bill, from Kingston to New York. When this cotton went into the hands of this road, it went there as cotton delivered to the Western & Atlantic Railroad, at Kingston, to be sent from there to New York, on a through freight list from Kingston to New York. The only evidence there is that the defendant ever had this cotton in possession at all, is from its own books, which, by the very same entries, show that the cotton came to this road from the Western & Atlantic Road, on a through freight list, not from Dalton to New York, but from Kingston to New York. How was this road to know that its through passage to New York was to begin at Dalton? It came to hand attended, as the books show, by a through freight list from Kingston to New York. The East Tennessee & Georgia Railroad was the second road on the line, not the first, as shown by the freight list accompanying the cotton. How were they to know, without any notice, that Montgomery intended its through passage to start at Dalton? The evidence shows that, in fact, it started as through freight from Kingston, and not from Dalton. As this road appears to have done its full duty, and as it, so far as its officers knew, was the second road on the line, and, as they had no notice that Montgomery was looking to them as the first, in my judgment they are only liable over their own line. This was a Georgia contract, and is to be regulated by Georgia law—our Code—and the road is liable who lost the cotton. This is easily ascertained. Every road keeps accurate books, and is able to show, in every case, if they have delivered goods to the next road.

WARNER, J., dissented, holding that in the absence of any express contract between the parties, the law

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would imply a contract from the defendant's letter, and from the fact that the plaintiff shipped his cotton over the defendant's road in pursuance of the terms of that letter.

Judgment reversed.

BABCOCK v. THE LAKE SHORE & MICHIGAN
SOUTHERN RAILWAY COMPANY.

49 *New York*, 491.

Court of Appeals of New York; May Term, 1872.

Carriers. Special contract limiting liability for loss of goods. Connecting lines. The fact that a contract by a railway company for the transportation over its line, and delivery at the terminus thereof, of goods marked to a point beyond such terminus, sets forth, in the description of the goods, the marks showing their ultimate destination, does not render it a contract for the transportation to and delivery at such destination. Even where, in making such a contract, a printed blank is used, adapted to a contract for transportation over other and connecting lines, if the portions of the contract in writing clearly express that the responsibility of the railway company ceases upon delivery of the goods at its terminus, such written portions must control, and the printed matter inconsistent therewith be rejected as surplusage.

Under such circumstances, the railway company has no authority to make a special contract, on behalf of the owner of the goods, with the next carrier, limiting the liability of the latter. The duty of the first carrier terminates with the delivery of the goods to the second, and the common-law liability of the latter attaches at once, by necessary implication, upon the receipt of them.

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Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover the value of certain petroleum shipped by the plaintiff, and destroyed while in charge of the defendant as common carrier.

The plaintiff had delivered the oil for transportation to the Atlantic & Great Western Railway Company, under a contract, partly printed and partly in writing, as follows :

“ Atlantic and Great Western Railway, 7.35.

“ Oil City Station, November 14th, 1867.

“ Received from Babcock for shipment by The Atlantic and Great Western Railway Company, the following property in good order, except as noted, marked and consigned as follows :

Mark.	Article.
J. W. O. & Co.	56 Bbls. R. Oil, Car 1,848.
J. W. Osborne & Co.	
Albany, N. Y.	
{ 5 Cent Internal Revenue Stamp, canceled. }	

“ Rate in cents per 100 lbs. \$25.00 per car.

“ Which this company and connecting roads agree to deliver with as reasonable dispatch as their general business will permit, delays and accidents excepted, but they do not agree to transport the same by any particular train, nor in any specified time.

“ Subject to the conditions below :

“ At Corry station upon payment of freight and charges thereon.

“ In consideration of the reduced rate given and specified above for the transportation of petroleum, it is understood that the owner or shipper assumes all risk of damage from fire or leakage or from any cause whatever while in transit, or at the depots or stations

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of any of the companies whose lines of road it may be transported upon or over.

“The rates on petroleum, when taken at the companies’ risk, or damage from fire or other causes, being double the amount herein specified. The owner or shipper of this property, in consideration of having the same transported at such reduced rates, does hereby release this and all other companies over whose lines of road it may pass, from all claim for loss or damage by fire, leakage, or any other cause whatever, such products of petroleum as naphta, benzine, benzole, &c., &c., being exceedingly hazardous, will not be transported except by special agreement as to time of receiving and rates to be charged; and any party shipping such articles without notifying the company and getting their consent, shall not only forfeit all claim against the company for damages sustained, but shall be accountable to the company for loss it may sustain in consequence thereof.

“The acceptance of this receipt by the owner or shipper will be considered as evidence of his assent to all the conditions contained therein.

“D. W. GURNSEY, JR., *Agent.*”

The price stated in the contract was the usual freight from Oil City to Corry.

The Atlantic & Great Western Railway Company carried the oil to Corry, and there delivered it to the Buffalo & Pittsburg Railroad Company, by which company it was carried to Brocton, and delivered to the Buffalo & Erie Railroad Company; and while in the possession of the last-named company the oil was destroyed by fire.

This action was brought against the defendant as the successor of the Buffalo & Erie Railroad Company, liable for all its debts and obligations. Upon trial by the court without a jury, judgment was rendered for the defendant, and the plaintiff appealed to

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the general term, which affirmed the judgment. From the latter judgment the plaintiff appealed to the court of appeals.

George W. Cothran, for the appellant.

A. P. Laning, for the respondent.

ALLEN, J.—To exempt the defendant, the successor in liability to the Buffalo & Erie Railroad Company, from the common-law responsibility of common carriers, extending to all losses except those resulting from the act of God or the public enemies, it must appear that the oil of the plaintiff was, at the time of its destruction, in the possession of the Buffalo & Erie Railroad Company, for transportation under a special contract, restricting the liability of the carrier, made by and with the plaintiff, or some one authorized to act in his behalf. The contract with the Atlantic & Great Western Railway Company was special in its terms, and by it the liabilities of the carrier were greatly restricted, and a loss by fire was excepted from the risks of the carrier, and if that was a through contract, that is, a contract for the carriage of the property to and a delivery of it at Albany, its ultimate destination, each carrier in the course of its transit, including the Buffalo & Erie Railroad Company, was entitled to the benefit of the exemptions from liability secured by it. It would be regarded as made for the benefit of all who should undertake the carriage of the goods upon the terms and conditions prescribed by it.

If it was not a through contract, then the Buffalo & Erie Railroad Company received the goods as common carriers, and are liable as such for all losses not within the recognized exceptions, that is, except those which were inevitable or occasioned by public enemies.

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If the first carrier, the Atlantic & Great Western Railway Company, only undertook for the carriage of the oil to Corry for an agreed compensation, and the delivery at that place to another carrier, there was no authority resulting from the relation, or the contract between that company and the plaintiff, to enter into a special contract, in behalf of the plaintiff, with the next carrier at Corry, to limit and restrict the liability of such carrier in any respect. There was no agency created; the whole duty of the Atlantic & Great Western Railway Company was that of carrier, and terminated with the delivery of the goods to the next carrier, and the common-law liability of the carrier receiving the goods attached at once, and by necessary implication, upon their receipt.

The goods were received by the Atlantic & Great Western Railway, at Oil City, in Pennsylvania, addressed to J. W. O. & Co., Albany, New York, and, had they been received without a special contract, a contract would not have been implied on the part of the railway company to carry the goods or provide for their carriage beyond the terminus of its road. Its whole duty would have been performed by transporting them to the extent of its own route and delivering them to the next connecting carrier, that is, the railway company would have been liable as a carrier over its own road and as a forwarder from the terminus of its line. This is the recognized rule in this and other States, although it is otherwise in England. *Root v. Great Western R. Co.*, 45 *N. Y.* 524, and cases cited by RAPALLO, J.; *Redf. on Carriers*, § 181, and cases cited in note 9. But the goods were received by the Atlantic & Great Western Railway Company under a special contract, and upon the interpretation of that contract and the effect to be given to it, the decision of this case hinges. In the agreement the goods were described as "56 bbls. R. Oil, Car 1,848," and in the

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margin "mark, J. W. O. & Co., J. W. Osborne & Co., Albany, N. Y." The mark or direction of the property was given to identify and distinguish it from other property of the same character, and was not inserted as a part of the agreement, and from it a contract to carry to Albany would not be implied. The agreement was by "this (The A. & G. W. R.) company and connecting roads," to deliver the property at Corry station, which was the terminus of the roads of that company, upon payment of freight and charges thereon. The freight was specified at twenty-five dollars per car. This was the freight to Corry, and no rate was agreed upon or specified for transportation beyond that place. By the agreement the plaintiff, "in consideration of the reduced rate given and specified above for the transportation of petroleum," assumed certain risks, including that by which the property was destroyed, "while in transit, or at the depots or stations of any of the companies whose lines of road it may be transported upon or over."

The plaintiff did, "in consideration of having the petroleum transported at such reduced rates," release the A. & G. W. R. Co., and all other companies over whose lines of road it may pass, from all claim for loss or damage by fire," &c. The agreement was made by filling up a printed form adapted to a contract for the transportation of goods beyond the route of the contracting carrier, and over the lines of other and connecting roads to distant places. The parties merely inserted in writing the date and place of shipment, the name of the owner, the description of the property, the freight and the place of delivery (Corry station). The commencement and termination of the responsibility of the carrier (the A. & G. W. R. Co.) were expressed clearly and distinctly in the written parts of the contract.

The goods were not lost or destroyed between the

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place of their receipt and Corry, nor until after they had left Corry in charge of other carriers, and had come into the possession of the Buffalo & Erie Railway Company, in the course of their transit to Albany. The contract was for the carriage of the oil to Corry, and only so much of the printed matter of the blank form used as is consistent with and appropriate to that contract is of any effect. The intent of the contracting parties is to be gathered from the entire instrument, the written part controlling where that and the printed are in conflict, and the latter to be rejected when incompatible with or inappropriate to the intent of the parties, as clearly indicated by the written portion. The printed form is very general, and contains provisions adapted to contracts differing essentially from this, some of which are not adapted to a contract for the carriage of goods wholly within the limits of the contracting carrier's line of road, and such parts as are inapplicable must be rejected as surplusage, and the written portion of the agreement prevail. *Leeds v. Mechanics' Ins. Co.*, 8 *N. Y.* 351; *Harper v. Albany, &c. Ins. Co.*, 17 *N. Y.* 194. The limitation of the carrier's liability by the contract is necessarily confined to the service contracted for, and the carriers who were parties to it.

Carriers who are not named in a contract for the carriage of goods, and who are not formal parties to it, may, under certain circumstances, have the benefit of it. Such is the case when a contract is made by one of several carriers upon connecting lines or routes for the carriage of property over the several routes for an agreed price by authority, express or implied, of all the carriers. So, too, in the absence of any authority in advance, or any usage from which an authority might be inferred, a contract by one carrier for the transportation of goods over his own and connecting lines, adopted and acted upon by the other carriers,

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would inure to the benefit of all thus ratifying it, and performing service under it. But in such and the like cases the contract has respect to and provides for the services of the carriers upon the connecting routes. *Maghee v. Camden, &c. R. R., &c. Co.*, 45 *N. Y.*, 514, and *Lamb v. Same*, 46 *N. Y.*, 272, are in point, and illustrate the rule.

There was no agreement here for the carriage of the oil beyond Corry, no rate of freight agreed upon to any other point, and the carrier was entitled to receive the freight earned, twenty-five dollars per car, on delivery of the oil at that place. There was no consideration for an agreement by the plaintiff to relieve the carriers who should thereafter receive the property for transportation from the common-law liabilities, and no such agreement was made. It is claimed that the finding of the judge by whom the cause was tried, that the Buffalo & Erie Railroad Company received the property, "under and in pursuance of said agreement, upon its said railroad from Brocton to Buffalo," is conclusive as a finding of fact, and entitles the defendant absolutely to the benefit of the stipulations of that contract. The answer is that the transportation from Brocton to Buffalo is not within the limits of the contract, and it was simply impossible that goods could be carried between those places in pursuance of a contract expressly providing for an entirely different transportation, or a transportation between two other places on a different route. While twenty-five dollars per car freight might have been a reasonable or a reduced rate for transportation from Oil City to Corry, it may have been an entirely inadequate or an exorbitant rate for transporting the same property from Corry to Brocton, from Brocton to Buffalo, or Buffalo to Albany. It is certainly improbable that the same freight was to be the compensation to each of the railroad companies by whom the oil should be carried in its transit to Albany.

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The contract was not intended as a through contract. The plaintiff has no claim under it either against the Atlantic & Great Western Railway Company or any of the connecting roads for the carriage of the goods beyond Corry, and it necessarily follows that its stipulations did not extend to or affect the carriage beyond that place.

The Camden & Amboy R. & T. Co. were held liable as common carriers under a contract somewhat like this, made with the Pennsylvania Railroad Company, under which the goods were transported by the latter company to Philadelphia and there delivered to the former company. *Camden, &c. R. R., &c. Co. v. Forsythe*, 61 *Pa. St.* 81.

Bristol, &c. R. Co. v. Cummings, 5 *Hurlst. & N.* 969, merely held, carrying out the doctrine of *Muschamp v. Lancaster, &c. R. Co.*, 8 *Mees. & W.* 421, which has not been followed in this State, that the contract of carriage in that case was a through contract made by the Great Western Railway Company for the carriage of the goods to their ultimate destination, and that the contracting carrier was solely liable for the loss of the goods in transit, although they were lost while in course of transportation by the defendant, who received them from the first carrier at the terminus of its road, for transportation to the place to which they were directed. This case would not be followed with us, but each carrier would be held responsible for a loss or damage to the goods while in his custody, and the only question would be as to the extent of his liability, and whether he was entitled to the benefit of any stipulations in the contract made with the first carrier.

The defendant, upon the case made and facts found by the judge at the trial, was subject to all the common-law liabilities of carriers, and the stipulations of the contract with the Atlantic & G. W. R. Co. did not extend to the transportation of the goods by the de-

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fendant. It is not necessary to consider at this time the liability of the parties, in case it should appear that the oil was being carried at a reduced rate of freight.

The judgment must be reversed and a new trial granted.

PECKHAM, and RAPALLO, JJ., did not vote.

Others concurred.

Judgment reversed.

THE ÆTNA INSURANCE COMPANY v.
WHEELER.

49 *New York*, 616.

Court of Appeals of New York ; June Term, 1872.

Carriers. Contract for transportation of goods. Connecting lines.

The rule that where a common carrier's contract to transport and deliver goods at a point beyond his own route contains a provision limiting his liability for loss or damage, succeeding carriers receiving the goods from the contracting carrier, for transportation to their destination, are entitled to the benefit of the limitation, does not apply where the first carrier contracts only for the transportation of goods over his own route and for their delivery to another carrier to be forwarded to their destination.

Thus, where a carrier by water receives goods under a contract to carry them to the end of its own route, and there deliver them to a railway to be forwarded over connecting lines to their final destination, the carrier by railway is not entitled to the benefit of any exceptions to the carrier's liability provided for by such contract.

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And the fact that the contract fixes the freight for the entire carriage at a price which, by agreement of all the carriers, is shared between them, does not make the contract one for the entire carriage, so as to extend its exemptions from liability to any carrier beyond the first.

Where a common carrier by water and a common carrier by railway, whose lines connect, enter into an agreement for the carriage of goods over the routes of both at a fixed price, to be divided between them, and where they use in common a certain warehouse for transferring such goods from one to the other, each paying a share of the expenses of such transfer, a delivery by the carrier by water at such warehouse of goods intended to pass over the railway, and notice to the carrier by railway of their arrival and destination, places the goods in the possession of the latter as common carrier.

Appeal to the court of appeals of New York from the general term of the supreme court in the third judicial district.

This was an action to recover insurance paid by the plaintiff upon flour alleged to have been destroyed while in the possession of the defendants as common carriers. The facts in the case, and the questions involved, appear in the opinion. Upon the report of a referee, judgment was entered for the defendants. The plaintiff appealed to the general term, and the judgment was reversed. From the order of the general term, the defendants appealed to the court of appeals, giving the required stipulation that if the order appealed from should be affirmed, judgment absolute should be rendered for the plaintiff.

L. Hasbrouck, Jr., for the appellants.

George B. Hibbard, for the respondent.

GROVER, J.—The order not stating that the judgment was reversed upon questions of fact, it must be

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assumed that the reversal was upon questions of law only. *Code*, § 268. The questions of law involved are whether the defendants were entitled to the benefit of the exceptions from the common-law liability of carriers contained in the contract of the Northern Transportation Company for the transportation of the flour; and, second, whether, from the facts found by the referee, the flour, at the time of its destruction by fire, was in the possession of the defendants as common carriers. The first question depends upon the construction of the contract of the Transportation Company. This, like every other contract, must be so construed as to carry into effect the intention of the parties, manifested by the language used, and if necessary, in the light of the surrounding circumstances. The contract was made and dated at Milwaukie, July 12th, 1864, as follows: "Shipped in good order and well conditioned, by A. J. Hale, as agent and forwarder, for account and risk of whom it may concern, on board the propeller City of New York (C. J. Chadwick, master), now lying in the port of Milwaukie, and bound for Ogdensburgh, the following articles, marked and numbered as per margin, and which are to be delivered in like good order and condition (the leakage of oils, molasses, liquors, and other liquids, and the dangers and accidents of navigation, fire, and collision excepted), without delay unto consignees at Ogdensburgh, paying freight and charges." In the margin was "H. & W. Chickering, Boston; care of George A. Eddy, agent, Ogdensburgh;" also a statement of property shipped (the flour in question, freight to Boston, \$1.10 bbl).

The facts found show that the Transportation Company had an agreement with the defendants, who were in possession of and operating a railroad as common carriers, running east from Ogdensburgh, to transport over their respective lines through freight in connection, and divide the compensation therefor as provided by

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the agreement. In *Maghee v. Camden, &c. Transp. Co.*, 45 *N. Y.* 514, it was held by this court, that when a railroad company contracted to transport and deliver goods at a point beyond its own line, containing a provision excepting liability from certain specified hazards, the connecting road which received the goods from the contracting road to carry to their destination was entitled to the benefit of such exception. Had the Transportation Company contracted for the carriage of the flour to Boston, this case would be governed by the case cited ; but that was not the contract. It contracted for the carriage of the flour to Ogdensburgh only ; and that the same should be forwarded by other lines to Boston ; and that the freight for the entire carriage should be one dollar and ten cents a barrel. Hence the case cited does not apply. This precise question, upon a state of facts more favorable to the party claiming the exception than those in the present case, arose in *Camden, &c. R. R. Co. v. Forsythe*, 61 *Pa. St.* 81 ; and it was there held that it was not an undertaking by the contracting road to carry the property to its destination, but simply over its own line, and then deliver it to the contracting road to forward to its destination ; and that contracting for the entire carriage for a fixed price to be shared by the roads did not change the contract in this respect ; and hence the last, or contracting road, was not entitled to the benefit of the exception contained in the contract. The authorities cited in the opinion of SHARSWOOD, J., fully sustain this position. In the absence of authority, I think the plain meaning of the contract is that the exception should apply only during the carriage of the property by the Transportation Company, and its delivery by it to the connecting line. The substance of the finding, as regards the second question, is that there was at the time an existing agreement between the defendants and the Transportation Company for the carriage of goods passing over both lines

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for a sum agreed upon for the entire service, to be divided between them as provided in the agreement; and that upon the arrival of boats of the Transportation Company at Ogdensburgh, destined east, the course of business was for the crew to unload such goods upon the dock, where they were taken possession of by J. Chamberlain & Co., and placed in a warehouse, by the side of which the tracks of the defendants extended, and give notice to the defendants. That when the defendants were ready to forward such goods their cars were run along by the side of the warehouse, from which the goods were taken and loaded upon the cars. That for this handling of the goods Chamberlain was paid thirty cents per ton; one-half by each company. The further fact found, that the bargain for this service was made with Chamberlain by the Transportation Company, was immaterial. The service performed by him was in the common business of both, and he was paid by each equally therefor, and must be considered in the employ of both. The title to the warehouses was not material. They were used by both parties for the transaction of this business; and the defendants owning both, to equalize the matter, rent for one was paid by the Transportation Company to the defendants, but both were used by the parties for the transaction of the business. It is the use of the warehouse that is to be looked at, and not the title, in determining the question. I have looked outside of the findings for some of the facts, for the reason that the case is referred to in the findings for this purpose. What is said about the key being kept, when out of the possession of an employee of Chamberlain, in the office of the Transportation Company, by the witness, is not material, as there is no pretense but that property, placed where this was, was taken and transported by the defendants at their pleasure. The case shows that notice of the arrival of this property and its destination was given by the

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Transportation Company to the defendants, by whom it was entered on their books for transportation. The flour remained in the warehouse for eight days after this, for the reason that the defendants had not cars for its transportation, when with the warehouse it was destroyed by an accidental fire. In *Coyle v. Western Railroad Corporation*, 47 *Barb.* 152, it was held that placing barrels in the usual place of delivery to a forwarder for transportation, which were received by persons in its employ, a part with the knowledge of its agent, though not counted, tallied, or receipted for, as had been usual between the parties, placed them in its possession as a common carrier. In *Converse v. Norwich Transportation Company*, 33 *Conn.* 166, it was held that when a company engaged in the transportation of goods by water in connection with a railroad company, for through rates divided between them, and the usage was for the boats, upon arrival, to deposit such goods upon a covered wharf used in common, and for the railroad to take such goods from there for transportation, that a deposit by the boat, according to the usage, was a delivery; and that the water line was thereby discharged from further responsibility. See also *Mills v. Michigan Central R. R. Co.*, 45 *N. Y.* 622. In the present case, the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. From this time it must be held to have been in the possession of the defendants as common carriers.

The order appealed from must be affirmed, and judgment absolute given for the plaintiff upon the stipulation.

All concurred.

Order affirmed. Judgment for the plaintiff

Boston, &c. R. R. Co. v. Shanly.

THE BOSTON & ALBANY RAILROAD COMPANY v. SHANLY.

Massachusetts.

Supreme Judicial Court of Massachusetts.

Carriers. Damages from explosion of articles in course of transportation. Manufacturers of explosive and dangerous articles, who send such articles by railway, without giving notice of their character to the railway company, are liable to the company for any damages to its cars and other property, or to property for which it is responsible as a common carrier, caused by an explosion resulting from the inherent tendency of such articles to explode, or from their being improperly packed.

But one who orders such articles to be manufactured and sent to him by railway is not liable for such damages, although he gives no notice to the railway company.

If two manufacturers of such articles, without giving notice to the carrier, ship different articles of such nature by the same railway car, although without any knowledge of each other's acts, and one such article causes the other to explode, they are jointly liable for the resulting damage.

Appeal to the supreme judicial court of Massachusetts.

This was an action to recover damages for injury to the plaintiff's cars and property, and to property in its charge as common carrier, caused by an explosion of dualin and exploders for dualin. The action was brought against Walter Shanly and Francis Shanly, who had ordered the explosive substances to be manufactured and sent to them; Hugo Dittmars, Carl Dittmars, and Gottlieb F. Burkhardt, who had manufactured and shipped the dualin; The Oriental Powder Company, and Jackson, Newhall, Smith, and

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Hurds, its officers and agents, who had manufactured and shipped the exploders.

The substance of the declaration is stated in the opinion. The defendants demurred on the ground that the declaration did not allege any legal cause of action; that it did not allege any joint tort or negligence of the manufacturers of the dualin, and the manufacturers of the exploders; that the allegation of damage was too indefinite; and that the plaintiff's own negligence contributed to the injury.

George S. Hale, for the plaintiffs.

As to the maintenance of the action in general: *Carter v. Towne*, 98 *Mass.* 567; *Wellington v. Downer Kerosene Oil Co.*, 104 *Mass.* 64; *Addison on Torts*, 16; *Stat. 29 & 30 Vict.* ch. 39; *Williams v. East India Co.*, 3 *East*, 192; *Langmaid v. Holliday*, 6 *Exch.* 761-767; *Brass v. Maitland*, 6 *Ellis & Bl.* 471; *Hutchinson v. Guion*, 5 *C. B. N. S.* 149; *Farrant v. Barnes*, 11 *Id.* 553; *Thomas v. Winchester*, 6 *N. Y.* 397; *Pierce v. Winsor*, 2 *Cliff.* 18; *Penton v. Murdock*, 2 *Law Times*, *N. S.* 871; *Illege v. Goodwin*, 5 *Carr. & P.* 190.

As to the joint liability of the parties: *Lynch v. Nurdin*, 1 *Q. B.* 35; 1 *Ad. & E. N. S.* 29; *Colegrove v. New York, &c. Co.*, 20 *N. Y.* 492; *Thorogood v. Bryan*, 8 *C. B., M. Gr. & S.* 115; *Hawkesworth v. Thompson*, 98 *Mass.* 77; *Eaton v. Boston, &c. R. R. Co.*, 11 *Allen (Mass.)* 500; *Abbott v. McKie*, 2 *Hurlst. & C.* 744; *Stone v. Dickinson*, 5 *Allen (Mass.)* 29.

As to the liability of the Shanlys: They set in motion the dangerous article, knowing its qualities, and there was a natural and probable connection between this wrong done by them, and the injurious consequences which have followed: *Lynch v. Nurdin*, 1 *Q. B.* 36; *McDonald v. Snelling*, 14 *Allen*, 290; *Scott v. Hunter*, 46 *Pa. St.* 192; *Thomas v. Winchester*, 6 *N. Y.* 397. If A. orders B. to commit a trespass, he is

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jointly liable with B.: *Com. Dig. Trespass*, c. 1; *Dicey on Parties*, 440; *Robinson v. Vaughton*, 8 *Carr. & P.* 252, 255. So he must be when he orders B. to place or send dangerous goods where they may injure third persons, as much as if he sold them to be resold; *Wellington v. Downer Kerosene Oil Co.*, 104 *Mass.* 64. In this case the other defendants were the agents of the Shanlys in delivering the dualin for carriage to the carrier indicated by them. *GIBSON*, Ch. J., in *Griffith v. Ingledew*, 6 *Serg. & R. (Pa.)* 437.

The Shanlys alone, on the facts alleged on the declaration, could maintain an action for the goods, or be sued for the freight. *Dicey on Parties*, 87. See also *Powell on Carriers*, 207, 208; *Angell on Carriers*, §§ 495, 497, 499; *Blanchard v. Page*, 8 *Gray (Mass.)* 281, 287-300; *Hutchinson v. Guion*, 5 *C. B. N. S.* 149; *Farrant v. Barnes*, 11 *C. B. N. S.* 553; *Herne v. Garton*, 2 *Ellis & E.* 64.

As to damages: *Sedgwick on Damages*, 109; *Dixon v. Bell*, 1 *Stark.* 228; *Richardson v. Chasen*, 10 *Ad. & El. N. S.* 756.

Charles Allen, for the defendants, *Walter Shanly* and *Francis Shanly*.

George Sennott, for the defendants, *Hugo Dittmars*, *Carl Dittmars*, and *Burkhardt*.

J. W. Perry, and *W. C. Endicott*, for the defendants, *The Oriental Powder Company*, and its officers and agents, *Jackson*, *Newhall*, *Smith*, and *Hurds*.

Brass v. Maitland, 6 *El & Bl.* 470; *Davidson v. Nichols*, 8 *Allen (Mass.)* 75; 11 *Id.* 514; *Van Steenburg v. Tobias*, 17 *Wend. (N. Y.)* 562; *Adams v. Hall*, 2 *Vt.* 9; *Auchmity v. Ham*, 1 *Den. (N. Y.)* 495; *Williams v. Sheldon*, 10 *Wend. (N. Y.)* 654; *Guille v. Swan*, 19 *Johns. (N. Y.)* 381; *Russell v. Tomlinson*, 2

Conn. 206 ; Coryton v. Lithbye, 2 *Saund.* 117 a, 117 b, notes by Williams ; Buddington v. Shearer, 20 *Pick. (Mass.)* 479 ; Parsons v. Winchell, 5 *Cush. (Mass.)* 592 ; Albro v. Jaquette, 4 *Gray (Mass.)* 99 ; Colegrove v. N. Y. &c. R. R. Co., 6 *Duer (N. Y.)* 382 ; 20 *N. Y.* 493 ; DUEK, J., dissenting opinion, 6 *Duer (N. Y.)* 419 ; Carter v. Towne, 103 *Mass.* 507 ; Flower v. Adams, 2 *Taunt.* 314 ; Tutein v. Husley, 98 *Mass.* 211 ; Thomas v. Winchester, 2 *Seld. (N. Y.)* 397 ; Wellington v. Downer Kerosene Co., 104 *Mass.* 64 ; Thorogood v. Bryan, 8 *M. G. & S.* 115 ; Lockhart v. Leichtenthaler, 46 *Pa. St.* 151 ; Cleveland R. R. Co. v. Terry, 8 *Ohio*, 570 ; Peterbaugh v. Reason, 9 *Ohio St.* 34 ; Brown v. New York Central R. R. Co., 31 *Barb. (N. Y.)* 335 ; 2 *Redf. Railw.* 196, 3d. ed. ; Smith v. Smith, 2 *Pick. (Mass.)* 621 ; Lamb v. Crafts, 12 *Metc. (Mass.)* 356 ; Gardner v. Joy, 9 *Id.* 177 ; Addison on Torts, 3d. ed. 393-395 ; Butler v. Hunter, 7 *Hurlst. & N.* 826 ; Sadler v. Henlock, 4 *Ellis & Bl.* 578 ; Reddie v. London, &c. Railway, 4 *Exch.* 255 ; Bell on Contracts of Sale, 84, 86, 87, 89 ; 2 *Kent Com.* 500 ; Story on Sales, 4th ed. §§ 305, 388, 390 ; Brown on Sales, §§ 523, 525, 526 ; 1 *Pars. on Cont.*, 5th ed. 532, 533 ; Benjamin on Sales, 515 ; Judson v. Western R. R. Co., 4 *Allen (Mass.)* 520 ; Norway Plains Co. v. B. & M. Railroad, 1 *Gray (Mass.)* 275 ; Clark v. Hutchins, 14 *East.* 475 ; Buckman v. Levi, 3 *Camp.* 414 ; Finn v. Clark, 10 *Allen (Mass.)* 479 ; 12 *Id.* 522 ; Finn v. Western Railroad Corp. 102 *Mass.* 283-288, 289-290 ; 2 *Redf. on Railw.*, §§ 176, art. 4 ; *Redf. on Carriers*, § 135 ; Coombs v. Br. & Ex. R. R. Co., 3 *Hurlst. & N.* 6, by WATSON, B. : Hudson v. Baxendale, 2 *Hurlst. & N.* 575 ; Addison on Cont. 480 ; Wood v. Cobb, 13 *Allen (Mass.)* 59 ; Forsyth v. Hooper, 11 *Allen (Mass.)* 419, 421 ; Brackett v. Lubke, 4 *Id.* 138 ; Linton v. Smith, 8 *Gray (Mass.)* 147 ; Hilliard v. Richardson, 3 *Id.* 349 ; Coomes v. Houghton, 102 *Mass.* 213 ; Quarman v. Burnett, 6

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Mees. & W. 994; *Milligan v. Wedge*, 12 *Ad. & El.* 737; *Rapson v. Cubitt*, 9 *Mees. & W.* 713; *Story on Agency* (*Redf. ed.*) § 452 *b*; *Williams v. East India Co.*, 3 *East*, 192; *Farrant v. Barnes*, 11 *C. B. N. S.* 553; *Carter v. Towns*, 98 *Mass.* 568; *Herne v. Garton*, 2 *Ellis & E.* 66; *Pierce v. Winsor*, 2 *Sprague*, 36; *S. C.*, 2 *Cliff.* 18; *Addison on Cont.* 6th ed. 470; *Addison on Torts*, 3d ed. 16, 407, 451, 456, 456; *Walker v. Jackson*, 10 *Mees. & W.* 161; *Putnam v. Tillotson*, 13 *Metc. (Mass.)* 517; *Merchants' National Bank v. Banks*, 102 *Mass.* 296; *Gilman v. Eastern Railroad*, 10 *Allen (Mass.)* 236, 237; *S. C.* 13 *Id.* 440; *Felch v. Allen*, 98 *Mass.* 572; *Seaver v. Boston, &c. Railroad*, 14 *Gray (Mass.)* 466; *Smith Master and Servant*, 3d ed. 107, 108; *Story on Agency*, §§ 217, 308; *Metc. on Cont.* 11; *Parsons v. Winchell*, 5 *Cush. (Mass.)* 592; *Hewitt v. Swift*, 3 *Allen (Mass.)* 425; *Campbell v. Phelps*, 1 *Pick. (Mass.)* 62.

CHAPMAN, Ch. J.—This case comes before us upon a demurrer to the plaintiff's declaration. The action is against Walter and Francis Shanly, of North Adams, Hugo and Carl Dittmars, and Gottlieb F. Burkhardt, of Boston, and the Oriental Powder Company, a corporation established in Boston, and Jackson, Newhall, Smith, and Hurds, of Boston, the officers or agents of the company.

The first count alleges that the plaintiffs are common carriers, between Boston and North Adams, upon their own railroad from Boston to Pittsfield; and thence to North Adams upon the Pittsfield & North Adams Railroad, of which they are lessees; that said Dittmars and Burkhardt manufactured for said Shanlys, at their request, as well as for other persons, a new, dangerous, explosive, combustible, and inflammable substance, called by a new name not generally known (but afterwards called *dualin* in the declaration), now

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in the market, and the qualities not generally known, and made in part of nitro-glycerine, which is of itself an explosive and dangerous substance ; that the Oriental Powder Company, and its said officers and agents, also manufactured for the Shanlys, at their request, as well as for other persons, certain dangerous articles called exploders, designed to be used for exploding said new compound, and of said exploders, ordered and requested said Dittmars and Burkhardt to send to them at North Adams, in the plaintiffs' cars, a quantity of said compound, and ordered and requested the said Oriental Powder Company to send them in the same way a quantity of said exploders, but gave no notice to the plaintiffs of the dangerous character of either of said articles ; that the Dittmars and Burkhardt sent ten cases of the compound, and delivered them to the plaintiffs as ten cases of dualin, knowing them to be of a dangerous character, but did not give notice to the plaintiffs, nor did the plaintiffs know of their dangerous character, but the Dittmars and Burkhardt declared that they were safe and not of a dangerous character ; that the Oriental Powder Company and their said officers and agents sent two hundred pounds of exploders accordingly, but packed them in an improper and dangerous manner, and gave the plaintiffs no notice of their dangerous character, but delivered them as "one box," and the plaintiffs did not know of their dangerous character ; that the dualin and exploders did, by reason of their nature and improper packing, take fire and explode, and the exploders taking fire and exploding, caused the dualin to explode, and this taking fire and exploding, both separately and by the combination thereof, destroyed sundry cars and other property of the plaintiffs, and other goods which they had as carriers, and for which they were liable to pay.

Both the dualin and the exploders are thus alleged

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to be explosive and dangerous articles. Each of them was sent without giving notice of its character to the plaintiffs, and they were ignorant in respect to it. The rule of law on this subject is in conformity with the dictates of common sense and justice, and is well established. One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it or be enabled, if he takes it, to make suitable provision against the danger. The reason for requiring this notice is still stronger, if other persons would be exposed to danger from it, but the duty is the same. This principle is established in application to the sending of goods by carriers in *Williams v. East India Co.*, 3 *East*, 192. See also *Brass v. Maitland*, 10 *Ellis & Bl.* 470; *Farrant v. Barnes*, 11 *C. B.* 557.

The duty does not arise from any contract, express or implied, but from the principle expressed in the maxim, *Sic utere tuo ut alienum non lædas*. The principle is held by this court in its broadest signification. In *Carter v. Towne*, 98 *Mass.* 567, it was held that a trader who sold gunpowder to a boy eight years of age, who had no knowledge or experience in the use of it, and was unfit to be trusted with it, and injured himself afterwards by its explosion, was liable to an action for the damage. In *Wellington v. Downer Kerosene Oil Co.*, 104 *Mass.* 64, an action was maintained against a retailer of fluids, for knowingly selling naphtha, a dangerous article, to be burnt in a lamp, the plaintiff being ignorant of its qualities. There are numerous cases which sustain this principle in various forms, but these are sufficient for its illustration.

This principle is not changed by the alleged fact that the Shanlys requested the Dittmars and Burkhardt to manufacture a quantity of the dualin in an

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unusually dangerous manner, and that they did so manufacture it. If it was a dangerous article, the duty of the sender was to give the notice, and if it was so in an unusual degree, that fact only made the duty more important.

But assuming that these parties were guilty of a violation of duty as alleged, it is yet contended that the manufacturers of the dualin and the manufacturers of the exploders can not be joined in one action for the injury. It is not alleged that these parties acted in concert in making the several articles, or placing their respective articles in the plaintiff's care, nor even that they had knowledge of each other's proceedings. Each acted separately in sending goods and omitting to give notice. But each party violated his duty none the less because he was ignorant as to what other articles were to be carried in the same car with his. By neglecting to give the notice, he took the risk of any danger that might reasonably be apprehended from the proximity of other goods that the carrier might take in ignorance of the danger. If, as the declaration imports, dualin and exploders are ordinarily used together, any person sending either of the two substances might reasonably apprehend the possibility that a quantity of the other substances might be carried with it. Nor is it material which of the articles caused the other to be ignited. Practically, a single injury was produced, and it is impossible to distinguish how much of it was actually produced by the exploders, and how much by the dualin.

The defendants cite a remark of Chief Justice SHAW, in *Marble v. Worcester*, 4 *Gray (Mass.)* 397, which, if they interpret it correctly, would leave a wrongdoer to injure others with impunity if other wrongdoers were guilty of independent acts that contributed to produce the same injury.

But the Chief Justice himself applied the remark

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to the case before him, which was an action upon a statute against towns; and the case is to be limited in its application to actions against towns. *McDonald v. Snelling*, 14 *Allen (Mass.)* 290.

They also contend that the case is like those where it is held that a joint action will not lie against the several owners of dogs which have together worried a flock of sheep, each owner being separately liable for the damage done by his own dog. *Buddington v. Shearer*, 20 *Pick. (Mass.)* 477; *Van Steenburg v. Tobias*, 17 *Wend. (N. Y.)* 562; *Auchmuty v. Ham*, 1 *Den. (N. Y.)* 495; *Russell v. Tomlinson*, 2 *Conn.* 206.

But in such cases there is no concurrence of interest or action among the several owners of the animals in producing the same injury. A person's responsibility for the act of his dog arises from the fact of ownership, and rests on different ground from that of his responsibility for the physical action of a chemical or mechanical substance prepared and sent by him, or of a nuisance which he had so placed as that it will occasion injury to others. This act is the direct cause of the injury done by such means. In this case the parties who wrongfully sent the dangerous substances were contributors to the catastrophe as much as if they had separately contributed to the raising of a pile of offal which occasioned an offensive odor, or had at one time separately fired a building by distinct torches, each of which contributed to a conflagration of the whole. It can not be that because the several wrongdoers have so contributed to the injury that it is impossible to distinguish what portion of it was caused by each, therefore they can escape with impunity. On the contrary, each is liable for the whole. The case is similar to *Stone v. Dickinson*, 5 *Allen (Mass.)* 29, and 7 *Id.* 260, where several creditors of Stone brought actions against him, and each caused him to be impris-

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oned for the same space of time. The injury being one, it was held that, though there had been no concert between them, he could maintain one action against all, and each was liable for the whole damage. The same doctrine was held in *Ellis v. Howard*, 17 *Vt.* 330. The many ways in which wrongdoers may injure another give rise to some nice distinctions, but when their several acts directly contribute to produce a single injury, each being sufficient to have caused the whole, and it is impossible to distinguish the portions of injury caused by each, that concurrence ought to render each of them liable for the whole in a joint action. On this ground, the manufacturers who sent the articles are jointly liable in this action.

The liability of the Shanlys depends upon their concurrence in the tortious acts of the other defendants. The declaration can not be fairly construed as alleging that the manufacturers were their servants or agents. It is alleged that they were manufacturers of the dangerous articles for the Shanlys and others.

The allegation that the Shanlys ordered and requested each of them to send a specified quantity of these articles to them by the plaintiff's railroad, imports an order from a purchaser such as is usually given by purchasers to manufacturers. If the articles were required in the order to be of unusual strength, this is not unlike the order for spirits of unusual strength, or cloth of unusual weight or fineness, or peculiar color, and does not change the nature of the transaction. Nor does it imply a request that the goods should be carelessly or improperly packed, or that there should be any neglect to give such notice to the carriers as would be proper. If nothing was said on these subjects, it would be implied that the packing and whatever else was proper, including notices and directions, should be properly attended to.

It being the duty of the senders to give proper no

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tice of the character of the goods to the carrier, the question arises whether it was also the duty of the consignee to give such notice. There is no authority for holding him to be thus liable, and it would be useless and unreasonable to require it of him. It should be given at or about the time of offering him the goods. The consignee is not likely to know the time, especially if he lives at a distance; nor is he likely to know what articles may be sent together; nor is there any occasion to send an additional notice, it being the duty of the consignor to give notice. In this case it is not alleged that the Shanlys requested the consignors to neglect any duty or conceal any fact, and there is no ground to hold them responsible for the negligence or improper conduct of the other defendants.

Demurrer of the Shanlys sustained. Demurrers of the other defendants overruled.

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Massachusetts.

Supreme Judicial Court of Massachusetts.

Carriers. Damages from explosion of articles in course of transportation. Manufacturers of explosive and dangerous articles, who send such articles by railway, without giving notice of their character to the railway company, are liable to the owners of buildings and other property for any damages to their property caused by an explosion resulting from the inherent tendency of such articles to explode, or from their being improperly packed.

But one who orders such articles to be manufactured and sent to him

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by railway, is not liable for such damages, although he gives no notice to the railway company.

If two manufacturers of such articles, without giving notice to the carrier, ship different articles of such nature by the same railway car, although without any knowledge of each other's acts, and one such article causes the other to explode, they are jointly liable for the resulting damage.

An action to recover such damages may be maintained, in the name of an owner of property so injured, by the railway company, as assignee of such cause of action.

Appeal to the supreme judicial court of Massachusetts.

This was an action to recover damages for injury to the plaintiff's building and other property, caused by the same explosion referred to in the preceding case, and brought against the same parties. Although prosecuted in the name of the owner of the property, the action was brought for the benefit of the plaintiff in the preceding case, the railway company upon whose car the explosion occurred; the plaintiff having received compensation from that company for the damage to his property, and having assigned to the company his cause of action.

Besides the grounds of demurrer stated in the preceding case, the defendants demurred in this, on the ground that it appeared that the plaintiff had been paid by the railway company, which now sued in his name to recover the amount paid him for the company's own negligence; that they could not sue in his name for their own benefit; and that no facts were set forth to show that the cause of action was assignable.

CHAPMAN, Ch. J. [After disposing of various grounds of demurrer, similar to those stated in the preceding case, by reference to the opinion in that case, proceeded to consider the grounds of demurrer, above

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stated, as follows.]—The fourth cause of demurrer assigned alleges that it appears from the plaintiff's writ and declaration that the plaintiff has received full compensation for all the damages suffered by him, and that the Boston & Albany Railroad Company have paid him, and sue in his name to recover back the amount so paid by them ; and the defendants show that if the Boston & Albany Railroad Company have paid said damages to the plaintiff, it was because their negligence had rendered them liable to pay him, and if they were negligent and liable to pay him, he can not maintain this action.

This statement includes an alleged cause of demurrer, and an argument. It is sufficient to say, in respect to it, that the writ merely alleges that the action is brought for the benefit of the Boston & Albany Railroad Company as assignees. This does not imply any fault or liability on the part of the assignees. The assignment may have been made for a variety of reasons. The allegation in the writ is mere surplusage ; it can only operate as a notice of such equitable rights as the assignment may confer ; nor is the allegation in the writ mentioned as a cause of demurrer.

Demurrer of the Shanlys sustained. Demurrers of the other defendants overruled.

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HALL v. THE NASHVILLE & CHATTANOOGA RAILROAD COMPANY.

13 Wallace, 867.

*Supreme Court of the United States ; December Term,
1871.*

Carriers. Insurance. An insurer of goods which are totally destroyed by an accidental fire while in the possession of a railway company as common carrier, after he has paid the loss to the owner of the goods, may recover the amount from the railway company, by suit in the name of the owner.

This right of the insurer rests upon the doctrine of subrogation, which applies to cases of insurance against fire on land, as well as to cases of marine insurance.

To sustain such an action by an insurer, it is not necessary to show any positive wrongful act by the railway company.

Error from the supreme court of the United States to the circuit court for the middle district of Tennessee.

This was a suit by insurers of certain cotton shipped on the defendant's railway, and destroyed, while in course of transportation, by an accidental fire. The insurers paid to the owners the amount of the insurance, and afterwards brought this suit against the railway company, in the names of the owners of the property, to recover the amount paid. The defendant demurred on the ground that the suit could not be maintained by the plaintiffs, upon the facts alleged, and the demurrer was sustained. To review this decision the plaintiffs prosecuted this writ of error.

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W. Atwood, for the plaintiffs in error.

Henry Cooper, for the defendant in error.

STRONG, J.—It is too well settled by the authorities to admit of question, that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus, as the insurer does, practically in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine prevails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a

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mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly or even principally out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in *Phillips on Insurance*, § 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea, which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.

In *Gales v. Hailman*, 11 *Pa. St.* 515, it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart v. Western R. R. Co.*, 13 *Metc. (Mass.)* 99, it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release the action brought by them in his name. There is also a large class of cases in which attempts have been made

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by insurers who had paid a loss to recover from the party in fault for it, by a suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers. *Rockingham, &c. Ins. Co. v. Boshier*, 39 *Me.* 253; *Peoria Ins. Co. v. Frost*, 37 *Ill.* 333; *Connecticut, &c. Ins. Co. v. New York, &c. R. R. Co.*, 25 *Conn.* 265. And such is the English doctrine settled at an early period. *Mason v. Sainsbury*, 3 *Dougl.* 60; *Yates v. Whyte*, 4 *Bing. New Cas.* 272; *Clark v. Blything*, 2 *Barn. & C.* 254; *Randal v. Cockran*, 1 *Vesey, Sr.* 98.

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance; and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an

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insurer, who may have entered into his contract of indemnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved or presumed to be the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter who has paid a loss is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

Judgment reversed, and cause remanded.

THE WASHINGTON, ALEXANDRIA, & GEORGETOWN RAILROAD COMPANY v. BROWN.

Supreme Court of the United States; October Term, 1873.

Actions. Service of process. In an action against a railway company, service of process upon one formerly a director of the company, where service upon a director is allowed by law, is sufficient, in the absence of proof that such person is no longer a director.

Receivers. The appointment of a receiver of the property of a railway company does not relieve the corporation from the duties and obligations imposed by its charter, or by the general laws of the state, unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. Where the road is run on the joint account of lessees and the receiver, and the servants employed and controlled by them jointly, both are alike responsible for any failure in the performance of the duties imposed.

Carriers. Discrimination as to passengers. The charter of a railway company contained a provision that no person should be excluded

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from the cars on account of color. A colored woman who entered the car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons, and upon her refusal so to do was ejected by force from the car she first entered. *Held*, that she was improperly ejected. The provision referred to could not be construed to mean merely that the company should allow colored persons to ride in its cars ; but that the former discrimination between white and colored passengers, in the use of the cars, should cease.

Error from the supreme court of the United States to the supreme court of the District of Columbia.

This was an action to recover damages for the ejection, by force, of the plaintiff, a colored woman, from a car of the defendant, which was appropriated to white ladies. The facts of the case appear in the opinion. The jury found a verdict for the plaintiff, and judgment was entered thereon. To review the judgment, the defendant prosecuted this writ of error.

DAVIS, J.—There are but three points in this record which the assignments of error bring before us for review, and only the last relates to the merits of the controversy.

It is objected that the circuit court did not acquire jurisdiction of the defendant below for want of proper service of process, but this objection is not well taken, because the process was served on Stewart, a director of the road, and this service was in conformity to law—10 *Stat. at L.* 810, § 3. It is true the marshal does not return as a fact that Stewart was a director, only that he was reputed to be so, but the record shows he was a director when the road was leased, and in the absence of proof to the contrary, it will be presumed this relation existed when the summons in this case was served. Even if the service were defective, the plaintiff in error is not in a position at this time to ex-

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cept to it. The record discloses that, soon after the action was commenced, a judgment by default was entered for want of a plea, and that the plaintiff in error appeared by attorney and moved the court to set it aside on the ground that there had been no sufficient service of process. This motion was denied for the reason stated, but the court ordered the default to be opened and the cause placed on the trial calendar, on the condition that the appearance of the plaintiff in error was entered by the receiver within a period of ten days. This order was, doubtless, made in order to give the company an opportunity to defend, and at the same time to set at rest the point raised about the service in case the merits of the action were tried. The condition thus imposed was complied with, and for aught that appears, the subsequent litigation has been conducted on the part of the company by its voluntary appearance in every stage of the case.

The second assignment of error denies the liability of the corporation for anything done while the road is operated by the lessees and receiver.

This road runs from the city of Washington, in the District of Columbia, to the city of Alexandria, in the state of Virginia, and was leased, in 1866, by the board of directors, for a period of ten years, to Stevens and Jackson. After this was done, the portion of the road within the district was, by a decree of the supreme court of the district, placed in the possession of a receiver, and when the wrong complained of was suffered, the whole road was run and operated on the joint account of the lessees on the Virginia side, and the receiver on the district side of the Potomac. On this state of facts, it is claimed the circuit court erred in refusing to charge as requested, that the plaintiff in error was not liable in this action.

It is the accepted doctrine in this country, that a railroad corporation can not escape the performance of

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any duty or obligation imposed by its charter, or the general laws of the state, by a voluntary surrender of its road into the hands of lessees. *Redf. on Railways*, 5th ed. ch. 22, § 1, p. 616. The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not, we are not called upon to decide, because it has never been held that the company is relieved from liability, unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver.

Apart from this view of the subject, the ticket on which the plaintiff rode was issued in the name of the Washington, Georgetown, & Alexandria Railroad Company, as were all the tickets sold at both ends of the route. The holder of such a ticket contracts for carriage with the company, not with the lessees and receiver. Indeed, there is nothing to show that Catharine Brown knew of the difficulties into which the original company had fallen, nor of the part performed by the lessees and receiver in operating the road. She was not required to look beyond the ticket, which conveyed the information that this road was run, as railroads generally are, by a chartered company. Besides, the company

having permitted the lessees and receiver to conduct the business of the road in this particular, as if there were no change of possession, is not in a position to raise any question as to its liability for their acts.

The third and last assignment of error asserts the right of the company to make the regulation separating the colored from the white passengers.

In the enforcement of this regulation, the defendant in error, a person of color, having entered a car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons. This she refused to do, and this refusal resulted in her ejection by force and with insult from the car she had first entered.

If she had the right to retain the seat she had taken, it is conceded the verdict of the jury should not be disturbed.

It appears that the Washington & Alexandria Railroad Company, in 1863, was desirous of extending its road from the south side of the Potomac near to the Baltimore & Ohio depot, in Washington, and congressional aid was asked to enable it to do so. The authority to make the extension was granted, 12 *Stat. at L.* 805, and the streets designated across which the road should pass. This grant was accompanied with several provisions. Among the number was one that no person shall be excluded from the cars on account of color. In 1866, the plaintiff in error, which had succeeded to the chartered rights of the previous company, obtained from congress an amendment to the former act, so as to change the route of the extension, and for other purposes, 14 *Stat. at L.* 248. The latter act leaves all the provisions of the former act in full force, and the present company, therefore, is obliged to observe in the running of its road all the requirements imposed by congress in its previous legislation on the subject. This leads us to consider what congress meant in directing

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that no person should be excluded from the cars of the company on account of color. The plaintiff in error contends that it has literally obeyed the direction, because it has never excluded this class of persons from the cars, but, on the contrary, has always provided accommodations for them.

This is an ingenious attempt to evade a compliance with the obvious meaning of the requirement. It is true, the words taken literally might bear the interpretation put upon them by the plaintiff in error, but evidently congress did not use them in any such limited sense. There was no occasion in legislating for a railroad corporation to annex a condition to a grant of power, that the company should allow colored persons to ride in its cars. This right had never been refused, nor could there have been, in the mind of any one, an apprehension that such a state of things would ever occur, for self-interest would clearly induce the carrier—south as well as north—to transport, if paid for it, all persons, whether white or black, who should desire transportation. It was the discrimination in the use of the cars on account of color, where slavery obtained, which was the subject of discussion at the time, and not the fact that the colored race could not ride in the cars at all; congress, in the belief that this discrimination was unjust, acted. It told this company, in substance, that it could extend its road within the district, as desired, but that this discrimination must cease, and the colored and white race, in the use of the cars, be placed on an equality. This condition it had the right to impose, and in the temper of Congress at the time, it is manifest the grant could not have been made without it. It was the privilege of the company to reject it, but to do this, it must reject the whole legislation with which it was connected. It can not accept a part and repudiate the rest. Having, therefore, constructed its road as it was authorized to do, and in this way greatly

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added to the value of its property, it will be held to a faithful compliance with all the terms accompanying the grant by which it was enabled to secure this pecuniary advantage.

The discussion at the bar touching the action of the plaintiff in error, in making and enforcing the regulation for the separation of races in its cars, took a wide range, but none of the points raised have been considered, because it was not necessary to do so in order to dispose of the case.

In our opinion there is no error in the record, and the judgment below must be affirmed.

Judgment affirmed.

THE UNION PACIFIC RAILWAY COMPANY
v. NICHOLS.

8 *Kansas*, 505.

Supreme Court of Kansas : July Term, 1871.

Carriers. Who are passengers. In an action against a railway company to recover damages for personal injuries, it appeared that a certain express company, by contract with the defendant, was entitled to use part of a baggage car on a passenger train of the defendant's railway, and the agents of the express company were allowed to ride on this car without paying fare. Other passengers were excluded from the car.

The plaintiff, by arrangement with the express messenger and a local agent of the express company, went into this car for the purpose of learning the route, so that he might take the express messenger's place in his absence. He was introduced to the conductor by the

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express messenger, as an express messenger learning the route, and afterwards acted as such, assisting the regular express messenger along the route. The conductor allowed him to ride in the baggage car without paying fare. There was room in the passenger cars for him. He was not in fact an express messenger, nor was he in the employ of the express company in any manner whatever; the express messenger and the local agent not having any authority to employ him in any capacity. The baggage car was overturned and the plaintiff injured. *Held*, that the plaintiff was not a passenger, and the defendant was not liable for the injuries to him.

Error from the supreme court of Kansas to the district court of Shawnee county.

This was an action to recover damages for personal injuries caused by the upsetting of the defendant's car, in which the plaintiff was riding. The facts are fully stated in the opinion. The jury found a verdict for the plaintiff. The defendant moved for a new trial, but the motion was denied, and judgment for the plaintiff entered on the verdict. To review the judgment the defendant filed a petition in error.

J. P. Usher, E. W. Dennis, and Martin, Burns, & Case, for the plaintiff in error.

Clough & Wheat, and T. P. Fenlon, for the defendant in error.

VALENTINE, J.—This was an action by Nichols to recover for injuries alleged to have been committed by the railway company. The petition of the plaintiff set forth that there was a contract between the parties; that the defendant undertook to carry the plaintiff as a passenger in a car used among other things for that purpose, from the state line near Kansas City to and beyond Monument station, for a certain hire and reward, and that while so carrying the said plaintiff the said injuries were caused through the negligence of

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the agents and servants of the defendant. But the said petition was not true, and there was no evidence to sustain some of the most material portions of it. We have all the evidence before us, and from that it unquestionably appears that there was no contract entered into between the plaintiff and the railway company; the plaintiff was not a passenger, within the true legal signification of the term; he did not get into or ride in any passenger car, and he did not pay or agree to pay any hire or reward for his passage.

The only connection that the plaintiff had with the railway company was as follows: He went on the train without purchasing any ticket, not into any passenger car, but into the baggage car, and into that portion of the baggage car which was used and occupied exclusively by the United States Express Company for their business, and remained there until he received the injuries of which he now complains. When the conductor of the train met him in the baggage car, he did not offer to pay his fare, but allowed himself to be introduced to the conductor as an express messenger. He was so introduced by Porter Warner, who had been up to that time, and then was, in fact, the regular express messenger for that train. And Warner also represented to the conductor that he "was learning Nichols the run." During the trip the plaintiff acted as express messenger, having the keys, and assisted Warner in handling and delivering the freight of the express company. The conductor, supposing the plaintiff to be an express messenger, and therefore entitled to ride in the baggage car, and to ride free, or rather supposing that his fare was paid or arranged for by the express company in their contract with the railway company, allowed him to ride in the baggage car, and collected no fare from him. The conductor made no contract with the plaintiff, but allowed him to ride on the contract made between the plaintiff's supposed

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employer, the express company, and the conductor's employer, the railway company. The conductor supposed that the plaintiff was riding in the baggage car, and free, by authority as high as that under which he himself acted, and by an authority which he had no power to revoke. The conductor therefore did not attempt to confer upon the plaintiff any right to ride upon that train, but simply left the plaintiff with the right which he supposed the plaintiff already had, independent of any authority from himself. But the plaintiff had no such right, nor any right there. He was not an express messenger, nor was he in the employ of the express company in any manner whatever. He was there simply by a private arrangement between himself and Warner, and one McNaughton, an agent of the express company at the state line, "for billing and transferring and delivering goods for the express company." He was there simply learning the route, so that he might be able to take the place of Warner during Warner's absence. But he was not there by any authority of the express company. Neither Warner, nor McNaughton, nor both together, had any authority to put him there. None but the president, vice-president, or general superintendent of the express company had any such authority, as is shown by the evidence. But the plaintiff did not even have the authority or consent of the local superintendent of the express company. Therefore he had no right whatever on said train.

Before proceeding further, perhaps, it would be proper to state that the said baggage car ran off the track and was upset, about three miles east of Monument station, because of a "low joint" in the rail, and injured the plaintiff and one or two others; that "none of the passenger coaches went off the track, so as to injure the coaches or any passengers;" that there were only about twenty passengers on the train during

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that trip, and that "there was room in the passenger cars for some fifty or sixty more passengers than were on the train;" that "the rules of the company prohibited passengers from riding in the express, mail, or baggage cars;" that the plaintiff was so injured as to impair his mind; and that the verdict of the jury and the judgment of the court were in favor of the plaintiff for twenty-two thousand five hundred dollars.

Now, so far as the argument or the decision of this case is concerned, it will be admitted that all the rulings of the court below were correct if the plaintiff had been a passenger within the true sense of that term. Also, that a regular express messenger is a passenger entitled to receive the same care as any other passenger, so far as the same can be exercised toward him, although nothing be paid for his transportation except what the express company pays to the railway company for transportation generally of their freight and agents. Also, that any person may be a passenger, entitled to all the rights and privileges of other passengers, without the payment of any fare, if he be on the train with the intention of being a passenger, and with the consent of the company or its officers, provided said consent be obtained without any fraud, or provided said company or its officers have a full knowledge of all the facts. Also, that a regular passenger may be allowed by the conductor the privilege of walking through the cars, or getting on the platform, or into the baggage car, without forfeiting any of his rights as a passenger. And also, that the obligations of common carriers of passengers do not rest wholly or even mainly upon contract, but principally upon the laws of the state in which such carriers do business.

But it will not be admitted that any and every person who may enter a car or go upon a train is a passenger, or entitled to all the rights and privileges of a passenger. The employes of the railway company

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are not passengers, although they may do more riding upon the road than any other class of persons. See the numerous decisions concerning the liability of railroad companies for injuries done to their employes through the negligence of other employes: *Shearman & Redfield on Negligence*, 101, 127, *ch.* 6, and cases there cited; 1 *Redf. on Railways*, 520, 537, and cases there cited. Where employes ride upon the road in consequence of their employment, and as employes, paying no fare, they are not passengers, although they may at that time, and on that particular train, not be performing any service for the company. *Higgins v. Hannibal, &c. R. R. Co.*, 36 *Mo.* 418, 432, *et seq.*; *Gilshannon v. Stony Brook*, 10 *Cush. (Mass.)* 228; *Seaver v. Boston, &c. R. R. Co.*, 14 *Gray (Mass.)* 466; *Russell v. Hudson River R. R. Co.*, 17 *N. Y.* 134. A person who enters the cars to see a friend safely seated, is not a passenger. *Lucas v. New Bedford R. R. Co.*, 6 *Gray (Mass.)* 64. A person who rides upon the engine of a train with the consent of the engineer, but contrary to a rule of the company, of which he is informed, is not a passenger. *Robertson v. New York, &c. R. R. Co.*, 22 *Barb. (N. Y.)* 91. And generally, whenever a person goes upon a train, or on any part of the train, without authority, he is not a passenger. *Moss v. Johnson*, 22 *Ill.* 633. It is probably true that the obligation of a common carrier of persons does not rest wholly or even mainly upon contract, but still no person can become a passenger except by a contract either express or implied. "A passenger is a person who *undertakes* with the *consent* of the carrier to travel in the conveyance provided by the latter, other than in the service of the carrier as such." *Shear. & Redf. on Neg.*, 292, § 262. It is true that whenever a person who desires to become a passenger on a railroad does all that the law and the rules of the company require of him for that purpose, it will be presumed that the company has

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given its consent, and that the requisite contract has been made ; for in such a case the company could not legally withhold its consent. But whenever it is shown that such person has not done what is required of him, no contract will be presumed. It will then devolve upon such person to show affirmatively that a contract has been made—to show affirmatively that the consent of the company has been given.

In the present case the plaintiff did not do what was required of him in order that he might become a passenger ; he did not himself make a contract with the railway company, or any of its agents ; and he had no right to ride under the contract made between the express company and the railway company. The consent obtained from the conductor was the consent that an express messenger might ride in the baggage car, and without paying his fare. Such consent did not apply to the plaintiff. But if it be said that the conductor applied it to the plaintiff, then it may be answered that it was so done under a misapprehension, induced by the plaintiff himself in allowing himself to be introduced to the conductor as an express messenger, and represented to be such, when in truth and in fact he was not such messenger. This was a legal fraud upon the conductor, and upon the railway company, whatever may have been the intentions of the plaintiff.

There was but little conflict in the evidence in this case—none upon the points we have been discussing. Therefore, whether the plaintiff was a passenger or not was purely a question of law. If he was a passenger, he was undoubtedly entitled to recover, for the railway company was unquestionably guilty of some negligence in allowing the track of the railway to get out of repair. Whether he was a passenger or not seems to have been considered by the court below as resting almost exclusively upon the moral intentions of the plaintiff. If the plaintiff honestly believed that he did right in doing

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as he did, or if he honestly believed that the circumstances of the case gave him the right to do as he did, then, according to the view of the court below, he was a passenger. But on the other hand, if he knowingly practiced a fraud and deception upon the conductor, whereby he was allowed to ride in the baggage car without the payment of fare, he was not a passenger. This theory seems to have run through the whole charge of the court, and the whole case seems to have turned upon it. The court below, therefore, erred in its charge, in some of the instructions that it gave, and in some of the instructions that it refused. We think, however, that it made no difference how honest the plaintiff was, nor how he viewed the transaction in its moral aspect.

For the reason that the court erred in charging the jury, and for the reason that there was no evidence to sustain some of the material allegations of the petition, the court also erred in overruling the defendant's motion for a new trial. The judgment is reversed and a new trial ordered.

KINGMAN, Ch. J., concurred.

BREWER, J., did not sit.

Judgment reversed.

Goetz v. Hannibal, &c. R. R. Co.

GOETZ v. THE HANNIBAL & ST. JOSEPH
RAILROAD COMPANY.

50 *Missouri*, 472.

Supreme Court of Missouri; August Term, 1872.

Carriers. Passengers. Reduced fares. A railway company, in consideration of a reduction of the usual rates of fares, may impose reasonable conditions upon passengers at the reduced rates; and if such conditions are not complied with, the company may demand the usual fare.

Appeal to the supreme court of Missouri from the circuit court of Linn county.

This was an action to recover damages for the ejection of the plaintiff from the defendant's cars. The facts are stated in the opinion. Under direction of the court, the jury found a verdict for the plaintiff; and from the judgment entered thereon the defendant appealed.

Hall & Oliver, for the appellant.

G. D. Burgess, for the respondent.

BLISS, J.—The plaintiff, with others, purchased a half-fare ticket from Brookfield to Macon, upon an agreement that they were to be returned at the same rate. When about to return to Brookfield he purchased at the Macon ticket office the same kind of ticket and went aboard the train. He had no regular permit to travel on such ticket, and the conductor had not been notified of the arrangement. The latter, therefore, de-

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manded the balance of the fare ; and the plaintiff refusing to pay it, the train was stopped, he was ordered to leave the car, and at once obeyed and walked back to Macon. In the evening of the same day he was forwarded to Brookfield without expense.

There is no evidence of any harsh treatment by the conductor, but the evidence shows that he was simply doing his duty. The road regulations forbid him from passing any one on half-fare tickets, unless those exhibiting them shall carry a permit from the proper officer to thus travel. This is a reasonable rule ; otherwise any one could purchase and travel upon such tickets. Defendant claimed to have shown that when the plaintiffs and his companions applied for a reduction of fare, it was too late to prepare excursion tickets, and a special arrangement was made by which the Brookfield ticket agent should sell half-fare tickets and notify the conductor of the approaching train, and that the excursionists should inform Mr. Burnett, the ticket agent at Macon, when they were ready to return, and he would do the same. Upon their return they came to the ticket office and purchased half-fare tickets of the clerk, but did not see Mr. Burnett, and he knew nothing of their departure until they came back, after having been put off the train. Under this state of facts defendant claims that it was plaintiff's duty to notify Mr. Burnett, the regular ticket agent, according to the arrangement, and that, not having done so, it was his fault that the conductor was not directed to pass them.

What the contract was, was a question for the jury ; but that the plaintiff was under obligation to comply with it, there can be no doubt. The railroad company is under no general obligation to carry any one for less than the usual rates, and if it does so for special accommodation, any reasonable condition imposed upon the passenger should be performed. If it were

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true that, instead of taking a written permit for the information of the conductor, the plaintiff and his companions agreed to inform the Macon ticket agent at the time of their return, in order that he might notify him, and they neglected to do so, it was their fault that the conductor remained in ignorance of their privilege, and they can not complain because he demanded the usual fare. This matter should have been submitted to the jury ; and when the court, by instruction No. 2 given on behalf of plaintiff, supposed a state of facts entirely ignoring it, and upon these facts directed a verdict, a one-sided view was presented, and the court committed error.

It is claimed that this defect was supplied by instruction given on behalf of defendant. An instruction in itself erroneous can not be so supplied. One that gives but part of a case may be, but there should be no contradiction. If the plaintiff has shown a state of facts that, of themselves and alone, would authorize a verdict, and other facts were claimed to have been proved by defendant, that would control these facts and require a different one, it would be a misdirection to direct a verdict upon the plaintiff's showing merely. The fact that it is contradicted by one given on defendant's behalf, tends rather to confuse than enlighten the jury. An ambiguous or general term in an instruction may be explained by another, and a partial view may sometimes be supplied, but the whole should be consistent and harmonious. *Thomas v. Babb*, 45 *Mo.* 384.

The whole case was not fairly submitted to the jury, and for this error the judgment is reversed and the cause remanded.

Others concurred.

Judgment reversed.

Churchill v. Chicago, &c. R. R. Co.

CHURCHILL v. THE CHICAGO & ALTON RAILROAD COMPANY.

Illinois.

Supreme Court of Illinois ; June Term, 1873.

Carriers. "Lay-over" tickets. The contract of a railway company to carry a passenger, when there is no agreement to the contrary, is entire in its character, and either party may insist on its being executed continuously, and not in fragments. If, by mutual consent, a new contract is made allowing the passenger to stop a certain time at an intermediate point, the terms of such new contract, if accepted by the passenger, are binding upon him, and he must comply with its conditions.

A passenger whose ticket entitled him to travel between two places on the defendant's railroad, procured from the conductor a "lay-over" ticket, allowing him to remain at an intermediate station, and complete his trip from there at any time within thirty days. He left the train at that place, and, after the thirty days had expired, entered another of the defendant's cars at the same place, to complete his journey. Upon his fare being demanded he tendered the "lay-over" ticket, which the conductor refused; and on his failing to pay the fare, the conductor ejected him from the car. *Held*, that the defendant could properly prescribe, as a condition of granting such "lay-over" ticket, that it should be used within a certain time, and the passenger, having accepted the condition, was bound thereby.

Error from the supreme court of Illinois to the circuit court of McLean county.

This was an action to recover damages for ejecting the plaintiff from the defendant's railway car. The history of the case and the questions presented are stated in the opinion. Judgment was rendered for the defendant; to review which the plaintiff brought this writ of error.

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Stevenson & Ewing, for the plaintiff in error.

Williams & Burr, for the defendant in error.

WALKER, J.—This was an action on the case brought by plaintiff in error, in the circuit court of McLean county, against defendant in error. The declaration contained two counts, to which a demurrer was interposed and sustained to the second count, but overruled to the first count; and plaintiff in error refusing to further prosecute his suit under the first count, the court rendered judgment for costs against him, and he brings the record to this court, and assigns for error the sustaining the demurrer to the second count of his declaration, and in rendering judgment against him.

The second count avers that plaintiff, at Chenoa, in McLean county, purchased a ticket of the proper agent, entitling him to travel on a passenger car from that place to Chicago. That he went on one of their passenger cars from Chenoa to the city of Joliet, when, desiring to stop over, he procured from the conductor a lay-over ticket, good for thirty days. That after the expiration of thirty days from that time he entered another of defendant's passenger cars at Joliet, going to Chicago, and when the conductor called for his fare he presented this lay-over ticket, which the conductor refused to receive, and he, with the brakeman, "forcibly and with great violence," thrust and ejected plaintiff from the car. On the one side it is contended that the ticket authorized plaintiff to travel at any time and on any of the cars or trains of the company from and to the places designated, notwithstanding the limitation of the time fixed in the ticket. That the company, through its agents, had no power to prescribe any time within which the ticket should be used. On the other hand it is claimed that the company has such power,

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and incurred no liability for what was alleged to have been done in removing plaintiff from the car.

Railroads being common carriers, and compelled to receive and carry all passengers who will pay the usual fare, they must do so under reasonable regulations. According to the usage, when a person applies a reasonable time before a passenger train leaves a station, the company are bound to receive the money and give to the applicant a ticket entitling him to travel on their cars from the place where purchased to the point named in the ticket, and for which it was purchased. And on the presentation of this ticket to the conductor, he is bound to carry him according to the terms of the ticket. In these particulars the company and their employes have no discretion. If the person holding the ticket is orderly, and deports himself properly, the company have no right to refuse the ticket, or to admit him to the class of car his ticket designates; and when thus admitted, the company has no right, so long as he deports himself properly, to eject or remove him from the train before reaching the station named in his ticket.

But does the same rule apply to the lay-over ticket?

The ticket a passenger purchases specifies no right to exchange it for a lay-over ticket. The contract to carry is like all others, when there is no agreement to the contrary, entire in its character. When the ticket is presented the holder has a right to have the contract to carry executed as an entirety, and not in fragments. The company can not insist that they have the right to perform their contract by carrying the passenger to intermediate points and putting him off, and requiring him to take the next or a subsequent train. This would violate the implied agreement that the company will not only carry the passenger to his place of destination on the road, but that it shall be without delay,

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and without requiring him to lay over, unless compelled to do so from unavoidable necessity.

When the company has entered upon the performance of their contract, the passenger has a right to insist that it shall continue until completed.

On the other hand, the right is reciprocal. When the passenger presents his ticket, and the road has entered upon the fulfillment of their contract, they have an equal right to insist that it shall be continuous till completed; that they shall not be required to perform in fragments. The contract to carry implies that either side may insist on its continuous completion. The parties, however, like parties to any other contract, may, by agreement, change the terms of the contract, so as to be executed in fragments, or different portions at different times. But this is a matter of contract only, neither party having a right to alter its terms. Such a change in the agreement can only be made by mutual consent, and the terms agreed upon by the parties in making the change must govern and control in its execution. It then becomes a new contract to carry according to that agreement. The company not being bound to give a lay-over ticket, when they do so it is upon the terms agreed upon by the parties, neither having the right to disregard them when given and accepted.

Appellant having a discretion in receiving the lay-over ticket, he was not bound by any offer or terms imposed, until he accepted it. He could neither demand such a ticket, nor impose the terms that should be embraced in giving it. If given or offered by the company, they could impose the conditions, and he could accept or reject it, with the terms proposed. But when he accepted it on the terms specified, he was bound by them. It became a valid and binding contract, and to render the lay-over ticket available, he should have used it within the specified time. The law would not

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compel the parties to execute this latter contract in any other manner or at any other time than as the parties had agreed. The second count shows no grounds of recovery, and the court below did not err in holding it fatally defective, and in sustaining the demurrer.

It is claimed that it is averred in the declaration that excessive force was used in ejecting plaintiff in error from the train. We find no such averment. The averment is that the servants of the company "did, forcibly and with great violence, thrust and eject plaintiff from the said cars." This does not imply that excessive force was used. There is nothing to show how much force was necessary. It may be that no more force was used than was absolutely necessary. Plaintiff in error may have resisted with such violence as to require all the force that was used. And as the company had the right to use all the force necessary for his expulsion, on his refusing to pay his fare or leave the train, on being requested, and he fails to aver that he did not resist, and that the force employed was wanton, we can not presume excessive force was employed by the company.

The judgment of the court below is affirmed.

Judgment affirmed.

Dietrich v. Pennsylvania R. R. Co.

DIETRICH v. THE PENNSYLVANIA RAILROAD
COMPANY.

71 *Pennsylvania State*, 482.

Supreme Court of Pennsylvania; May Term, 1872.

Carriers. Right of passenger to "stop off." A passenger by railroad upon a "drover's ticket," bought at less than half the regular rates, expressed on its face to be good only in his hands for one seat between certain specified points and dates, left the train at an intermediate point, and, getting on another train the next day, the conductor put him off, but afterwards allowed him to proceed. He was put off by another conductor, who afterwards took charge of the train; he entered again, paid his fare to prevent being put off, and proceeded to the end of his journey.

Held, 1. That the face of the ticket did not import a right to stop off, and the passenger had no cause of action against the company for his ejection.

2. The one conductor allowing the passenger without right to ride on the train a part of the distance covered by his ticket, did not give him a right to be carried the whole distance. A purchaser of a railroad ticket must inform himself of the rules governing the transit and conduct of the trains; and the burden is not on the company to show that a passenger had notice of their reasonable rules in running trains.

3. "Good for one seat" meant a seat in the train on which the passenger entered to be carried; not by different trains or by broken stages.

4. This rule is subject to the exception that a passenger may resume his journey, where, by misfortune or accident, not his fault, it has been interrupted.

Error from the supreme court of Pennsylvania to the court of common pleas of Lancaster county.

This was an action on the case by Adam Dietrich against The Pennsylvania Railroad Company, for

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ejecting him from a car of the company in which he was traveling.

The plaintiff, a shipper of cattle, testified that on March 11, 1867, he purchased in Philadelphia a ticket, of which the following is a copy :

“DROVER’S TICKET.

“Not Good on the Philadelphia Express.

“Good only in the hands of Mr. A. Dietrich, for one seat from Philadelphia to Pittsburgh.

“This ticket good only until March 16th, 1867.

“Issued March 10th, 1867. S. H. WALLACE, Agent.”

The ticket was stamped on the back :—

“Penna. Railroad, March 11th, 1867, Philadelphia.”

He paid five dollars for the ticket ; the regular fare from Philadelphia to Pittsburg was eleven dollars. He had bought such tickets or passes for a year before, but had also bought tickets from Philadelphia to Lancaster, stopped off there, and then used his pass from Lancaster to Pittsburg. He had been told by a conductor that he must go on a continuous train ; he asked Mr. Wimer, a freight agent, whose business it was to indorse a certificate to enable shippers of cattle to get a drover’s ticket. He said that “it was not intended for men like me who shipped every week to buy one additional ticket for Philadelphia. I asked Mr. Francis to indorse this ticket to stop off at Lancaster ; he said, ‘No, sir.’” Plaintiff had heard Mr. Young, the conductor, refuse a man who had a similar ticket. Young said there was an order to that effect. After plaintiff purchased the ticket on the 11th, he got on the fast train, and he came to Lancaster ; there he got off and remained at his home that night ; next day he took the fast line at Lancaster for Pittsburg. Mr. Young, the conductor, when he came around for the tickets, told plaintiff he would have to get off at Landisville (the first stopping place beyond Lancaster) ; plaintiff did not get off. When the conductor came again, he said,

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“You did not get off at Landisville;” plaintiff said, “I didn’t intend to get off.” Young then told the brakeman to put him off at Mount Joy, the next stopping place. When the train reached there, the brakeman told him he was at Mount Joy; plaintiff said, if the brakeman put him off he would not resist; the brakeman put him off. Young told him to get on again, and he was carried to Altoona. Young there left the train, and it was taken charge of by another conductor, Mr. Hawkins. After the train was on its way, Hawkins told plaintiff he could not recognize his ticket; at Galitzin on the top of the Allegheny mountain, Hawkins put him off. Plaintiff got on as the cars were starting. Hawkins demanded his fare, which he said he must pay or he would have to get off; plaintiff paid his fare to Pittsburg. “Hawkins was not rude or unkind; he told me it was his duty to collect the fare or put me off.” The plaintiff closed.

The defendant moved for a nonsuit, which the court directed to be entered.

The plaintiff removed the record by writ of error to the supreme court, and assigned for error the entry of the nonsuit.

S. H. Reynolds, and *O. J. Dickey*, for the plaintiff in error.

G. F. Breneman, and *H. M. North*, for the defendant in error.

AGNEW, J.—This was a judgment of nonsuit, and the question is, whether the plaintiff’s evidence disclosed a case for the jury. Dietrich, the plaintiff, was a drover, residing in Lancaster county. On the 11th of March, 1867, he purchased a drover’s ticket from Philadelphia to Pittsburg, and took passage on the fast line on the defendant’s railroad. At Lancaster he

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got off, and next day (the 12th) he resumed his journey. When the conductor, Young, came along collecting fares, he declined the plaintiff's ticket, on the ground that he had "stopped off," and informed him such were his orders. Young told him he must get off at Landisville. After passing Landisville, finding him still on the train, Young told him he must get off at Mount Joy. At Mount Joy the brakeman put him off, but Young, who observed the brakeman taking him across the track, halloed at him not to put him off in that way; and told Dietrich to get on again. He was then carried to Altoona, where Young's portion of the route ended. After leaving Altoona, Hawkins, the conductor from Altoona to Pittsburg, came around, and the plaintiff exhibited his drover's ticket. Hawkins refused it, and put him off at Galitzin, at the west end of the mountain tunnel. The plaintiff got on without leave, and Hawkins again refusing his ticket, the plaintiff paid his fare from Altoona to Pittsburg.

On his cross-examination, the plaintiff stated that Hawkins was not rude or unkind, and told him it was his duty to collect the fare or put him off. Dietrich said to him, I want this tested, and I want you to put me off genteelly. The question is, therefore, simply upon a breach of the contract for carriage, and depends on its terms. Before examining the terms of the ticket, it is proper to clear the case of some immaterial matters. Stress is laid on the statement of Wimer, that the restriction of stopping off was not intended for such men as he, who shipped stock over the road every week. This clearly has no influence whatever in ascertaining or interpreting the terms of the ticket he afterwards purchased from the proper ticket agent. Wimer was a mere freight agent, whose duty had no relation to the sale of tickets, but was confined to giving the required certificate to entitle Dietrich to a drover's ticket. When Dietrich went to Franciscus, and asked

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him to make the ticket so as to stop off at Lancaster, Franciscus said, "No, sir." He admits that he knew of the restriction as to stopping off, which his request implies, and that he had seen Young refuse another drover's ticket for this cause, and that in consequence he had been in the habit of buying a ticket from Philadelphia to Lancaster, when he wished to stop off. The restriction, and his knowledge of it, if this were necessary, are plainly proved by himself. It is evident, therefore, that the plaintiff is thrown upon his ticket and the terms it imports or recognizes, as the evidence of his right of transit over the defendant's road. The ticket is in these words: "Drover's ticket. Not good on the Philadelphia Express. Good only in the hands of Mr. A. Dietrich for one seat from Philadelphia to Pittsburg. This ticket good only until March 16th, 1867. Issued March 11th, 1867. S. H. Wallace, agent." On the back is stamped "Penna. R. R., March 11th, 1867. Philadelphia." Such tickets are evidence of the payment of the fare, and of the right of the holder or party named, as here, to be carried according to their terms. So far as they are expressed the terms are binding of course, but such tickets are not the whole contract, which must be gathered, so far as not expressed, from the rules and regulations of the company in running its trains. This is the generally received doctrine, with the qualification, however, that these rules and regulations must be reasonable and not contrary to the terms expressed. See *Johnson v. Concord R. R. Co.*, 46 *N. H.* 213, and cases there cited; *State v. Overton*, 4 *Zabr. N. J.* 435; *Cleveland, &c. R. R. Co. v. Bartram*, 11 *Ohio St.* 457; *Cheney v. Boston, &c. R. R. Co.*, 11 *Metc. (Mass.)* 121. With the same qualifications of reasonableness it is also well settled that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. Thus he must ascer-

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tain the train in which he is to go. the time of its departure and arrival, its stopping stations, his right to get off and get on, to resume his trips, &c. See the cases *supra*. If the law were otherwise a railroad company could not regulate the running of its trains to suit the interests of the public or of itself. For this purpose some trains must be fast, with few stoppages. Others must be slow, with frequent stoppages. Some must be through trains and others local. It is very clear that a passenger with a through ticket can not require a local train to carry him through. Nor can he require a through train to stop at a way station not in its time table. Even having a stop-off ticket would not increase his right to require the train to stop at a station not in its time table.

It is evident that if in such cases the holders of tickets can compel the trains to alter regulations, they would be governed by the passengers and not by the company. An excursion party on this principle, stopping off at will, would overcrowd a subsequent train, to the discomfort of the proper passengers, and to the prejudice of the interests of the company. The authorities, as well as the reason of the thing, show that the company must make its own regulations, and that passengers purchase their tickets subject to these rules, and that it does not lie on the company to bring home notice of them in order to establish the terms of the contract of carriage. In this case, the testimony of the plaintiff himself clearly shows that his ticket did not entitle him to stop off at Lancaster, and if notice were necessary, he knew that fact. This brings us now to the question whether the face of the ticket, by its terms, imports a right to stop off. The first noticeable and very obvious thing is, that the terms on the face of the ticket are very restrictive. It is expressed to be a "Drover's ticket." It can not be used by any other than a drover. Then it is not good on the Philadelphia

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express ; it is "good only in the hands of Mr. A. Dietrich ;" no one else can use it ; then, "this ticket is good *only* until March 16th, 1867." It is therefore not good after that day. It is restrictive from the beginning to the end, and is wholly unlike a general ticket, which any holder may use, within any reasonable time ; and yet even as to such tickets the authorities are clear. The right to stop off at intermediate unnamed points does not exist unless by means of stop-off tickets, or the customary rules of passage. The expressed terms of a drover's ticket being all restrictive, without exception, it gives no countenance to an implied right to stop-off. The reason is obvious also ; the ticket is sold at less than half price ; that is, this was for five dollars instead of eleven. Its purpose is special, and the restriction in time (until March 16) was to prevent abuse of the benefit intended to be conferred on a particular class of persons.

With all these restrictions on the face of the ticket, and in full view of the purpose of the ticket, it is obviously impossible to interpret the words "good *only* until March 16th," into an enlargement of the contract, so that it shall read, contrary to the regulation of the company, "good to travel every day, from day to day, from the 11th to the 16th of March, by as many trains from and to every station at which the trains stop, and by as many stages as A. Dietrich may elect to make." Then when we come to the marrow of the ticket, to wit, good for "*one* seat from Philadelphia to Pittsburg," it does not change the purpose and the restrictive character of it. There is nothing in the words "*one* seat," which enlarges the meaning, so that the holder may take seat after seat, train after train, day after day, and from station to station, especially in contravention of the known regulations of the company as to the travel on such tickets. It necessarily follows, that the contract for "*one* seat from Philadel-

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phia to Pittsburg," must mean in the train which the holder of the ticket enters to be carried, and not by train after train, and by broken stages, day after day. That this is the true interpretation of the contract, is decided in *State v. Overton*, 4 *Zabr.* (N. J.) 438; *Cleveland, &c. R. R. Co. v. Bartram*, 11 *Ohio St.* 462; *Johnson v. Concord R. R. Co.*, 46 *N. H.* 213; *Cheney v. Boston, &c. R. R. Co.*, 11 *Metc. (Mass.)* 121; *Angell on Carriers*, ed. 1808, § 609. No cases are cited to the contrary, and we remember none. The language of Chief Justice GREEN on this point, in *State v. Overton*, is so much to the purpose we quote it: "The question," he says, "is obviously a question of contract between the passenger and the company. By paying for passage and procuring a ticket from Newark to Morristown, the passenger acquired the right to be carried directly from one point to the other without interruption. He acquired no right to be transported from one point to another upon the route, at different times, and by different lines of conveyance, until the entire journey was accomplished. The company engaged to carry the passenger over an entire route for a stipulated price. But it was no part of the contract that they would suffer him to leave the train and resume his seat in another train at any intervening point upon the road." "If the passenger chose voluntarily to leave the train before reaching his destination, he forfeited all rights under his contract. The company did not engage and were not bound to carry him in any other train, or at any other time, over the residue of the route." "This is the clear legal effect of the contract between the company and the passenger in the absence of any evidence to the contrary. If the passenger insists that under his contract, by virtue of general usage, or the custom of the road, he is entitled to be carried at his pleasure, either by one or different trains, the burden of proof was upon the state;" that

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is, it lay on the passenger, the case being an indictment against a conductor for a battery in putting off a passenger unlawfully.

In adopting this language of the learned chief justice of New Jersey, we should not omit to guard our meaning by saying there may be exceptions where, from misfortune or accident, without his fault, the transit of a passenger is interrupted, and where he can resume his journey afterwards. In the present case the ticket of Dietrich gave him no right to stop off, and the company, when he took his seat in the train at Philadelphia, having entered upon the performance of his contract, had a right to continue its execution without interruption. Another reason is, that fare covers the ordinary luggage of the passenger, entitling it to be checked through to the point of destination. But if the passenger may stop off, he may demand his baggage at each stoppage, or if it go on, he will not be at the end of the journey to receive it. The contract was therefore broken by Dietrich himself, when he stopped at Lancaster without permission. When he came upon the train, the next day, he began a new journey, and on refusing to pay his fare he became a trespasser, and was rightfully put off at Mount Joy. But it is argued that as he was permitted by Young to re-enter the train and was carried to Altoona, he acquired a right to be carried to Pittsburg. This is erroneous. When Dietrich stopped at Lancaster his right of transportation under his ticket ended, as we have seen. Consequently, when he began a new passage, the next day, he was bound to pay his fare. He knew this, and that he was put off at Mount Joy because he would not pay it. Therefore Young, as conductor, being bound by the rules of the company, not only had no authority, but acted against his orders in permitting him to return upon the train without payment of his fare. The ticket having lost its title to be

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recognized, all that Young did thereafter was unauthorized, and the plaintiff knew this. Clearly, no title to be carried through to Pittsburg could be acquired by Young reoffering him to ride without payment of his fare. Young could not carry him, and could not, by his omission to collect the fare, send him forward without payment of any. His violation of duty in carrying a passenger without payment of fare, clearly could not bind his successor upon the remainder of the route. It is very clear that when Hawkins took his place on the train, between Altoona and Pittsburg, it was not only his right but his duty to demand the fare between those places. He found Dietrich without a ticket importing a right of passage, and without any evidence of payment of the fare. The fact that the company had lost the fare from Lancaster to Altoona by Young's violation of duty, conferred no right of further transportation, while Dietrich, at every step afterwards, was traveling without right, and with full notice that he was doing so. As remarked in *Beebe v. Ayres*, 28 *Barb. (N. Y.)* 278, the conduct of one conductor in violating the rules of his employers, could not prejudice another employe more faithful than himself, who has adhered to his instructions, and discharged his duties under them. The judgment of the court below is therefore affirmed.

Judgment affirmed.

Maples v. New York, &c. R. R. Co.

MAPLES v. THE NEW YORK & NEW HAVEN
RAILROAD COMPANY.38 *Connecticut*, 557.*Supreme Court of Errors of Connecticut; October
Term, 1871.*

Carriers. Ejection of passenger not showing ticket. The plaintiff had purchased from the defendant, a railroad company, a commutation ticket which entitled him to ride in defendant's cars between two places specified, during a year, upon the condition, among others, that the ticket should be shown to conductors when requested, or when required by the rules of the company ; and at the time of purchasing the ticket the plaintiff signed a receipt containing similar conditions. One of the company's rules in force during the year required commuters to show their tickets to conductors when required, in the same manner as other passengers. During the year, while the plaintiff was riding in the defendant's cars, between the places specified, he was requested by the conductor to show his ticket. He had his ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but acting in accordance with defendant's instructions, he demanded from the plaintiff his fare for the trip, and on his refusal to pay it ejected him from the train.

Held, 1. That the plaintiff was entitled to a reasonable time to find his ticket, and should have been allowed to ride as long as there was any reasonable expectation of finding it during the trip.

2. That under the circumstances the production of his ticket by the plaintiff was the merest formality ; and in the absence of an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendant in rescinding it, and treating the plaintiff as a trespasser.

3. That if the defendant had a right to eject the plaintiff from the train, it had no right to do so elsewhere than at a regular station on the road ; and any rule or regulation which allowed such an act to be done at a point between two stations, was under the circumstances, unreasonable, and therefore void.

· *Maples v. New York, &c. R. R. Co.*

Error from the supreme court of errors of Connecticut to the superior court of Fairfield county.

This was an action of trespass on the case for ejecting the plaintiff from the cars of the defendant. The facts are stated in the opinion. Judgment of nonsuit was rendered, and a motion by the plaintiff to set aside the nonsuit was denied. For the refusal to set aside the nonsuit, the plaintiff filed a motion in error.

Thompson, for the plaintiff in error.

Child, for the defendant in error.

PARK, J.—We think there is manifest error in the decision of the court below in refusing to set aside the nonsuit that had been ordered by the court. Some time in the month of December, 1868, the plaintiff purchased of the defendant a commutation ticket, which conferred upon him the right to ride in the cars upon the defendant's railroad from the town of Westport, to the city of New York, during the year 1869, upon certain conditions. One of the conditions was that the ticket should be shown to conductors when requested, or when required by the rules of the company. One of the company's rules in force during the year, and the only one that it is important to consider, was as follows: "Commuters will show their tickets to the conductors in the same manner as other passengers, when required." One of the conditions in the receipt signed by the plaintiff at the time he received his commutation ticket from the defendant was to this effect: "The commutation ticket is to be shown to conductors, and whenever otherwise required by the rules of the company, in the same manner as are other passenger tickets."

On May 24, 1869, the plaintiff entered the cars of the defendant at the city of New York, to ride over the defendant's road to his home in Westport.

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When the train was about four miles from the city the conductor of the train requested the plaintiff to show his ticket. The plaintiff had his ticket, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time mentioned in the ticket had not expired, but acting in accordance with the instructions of the defendant, he demanded of the plaintiff his fare for the trip, and told him that unless he paid it he should eject him from the train. The plaintiff refused to pay the fare, on the ground that he had his ticket but was unable to find it, and had paid his fare by the purchase of the ticket. Thereupon the conductor stopped the train and ejected the plaintiff from the cars. During the morning of that day the plaintiff rode to New York on his ticket, and at night when he retired it was found upon his person. These are the principal facts, and we think they show that the defendant broke its contract with the plaintiff in ejecting him from the train at the time it was done. When the conductor requested the plaintiff to produce his ticket it happened to be mislaid. The plaintiff was entitled to a reasonable time to find it. The contract required him to show his ticket to the conductor, but he was not bound to do it immediately when requested. The conductor knew the plaintiff was a commuter, and the only question in his mind was whether the plaintiff would be able to produce his ticket. The plaintiff informed him that he had it, but was unable to find it because it was mislaid. Under such circumstances the plaintiff was entitled to ride as long as there was any reasonable expectation of finding it during the trip. Had a reasonable time been allowed him to find it, undoubtedly it would have been found, for it was upon his person, and dropped from his garments when he undressed himself to retire that night. The case was unlike that of *Downs v. New York, &c. R. R. Co.*, 36 *Conn.* 287. There the plaintiff had left

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his ticket at home, and so informed the conductor. The ticket could not by possibility be produced, and the plaintiff knew it, and so did the conductor. Delay in that case would have been of no avail. The fact was certain. The case here is directly the opposite of that in this important respect.

Again, in the case of Downs there was an express stipulation in the contract that he should pay his fare for the trip if the ticket should not be shown to the conductor when requested. Here there was no such stipulation. It is true the contract required the plaintiff to show his ticket to conductors when requested by them, or when required by the rules of the company, but it may well be questioned whether the breach of such a condition in the contract gave the defendants the right to eject him from the train, when they knew through their conductor that he was a commuter, and knew that his inability to produce the ticket arose simply from the fact that his ticket was mislaid. In the case of Downs the trip was virtually excepted from the operation of the ticket by the express stipulation in the contract to pay fare for the trip if the ticket should not be produced. The case was the same as it would have been if the contract had declared in express terms that the ticket should only apply to cases where it was produced, and all other cases should be excepted from its operation. Downs, therefore, was nothing more than a common passenger on the train, without a common passenger ticket, and was liable to be dealt with as a common passenger. But here the contract embraced the trip as much as it did any other trip that the plaintiff might make on the road. The plaintiff agreed to show his ticket in like manner with other passengers. This was required in order that the conductor might know that he was a commuter. But the conductor knew the fact.

The production of the ticket under such circum-

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stances was the merest formality. Suppose the plaintiff had agreed with the defendant that he would show his ticket to the conductor three times during each passage over the road, and on the trip in question he had shown his ticket twice to the conductor, but when required the third time to produce it the ticket happened to be mislaid. Suppose the conductor should distinctly remember that the ticket had been twice produced, and the production of it the third time would give him no needful information. Would the defendant be justified in ejecting him from the train without an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be three times produced? We think not. So we think here. There must be something more than the merest technical breach of the contract, in order to justify the defendant in rescinding it so far as it applied to the trip, and treating the plaintiff as a trespasser upon the train.

We have made no allusion to the order that was passed by the defendant in January, after the plaintiff purchased his ticket. That order has no application to the case, for it is obvious that the defendant could not at that time add new conditions to the plaintiff's contract. That order was in force when Downs made his contract with the defendant, and it was an important consideration in the decision of that case.

Again, we think on another ground that the plaintiff made out a *prima facie* case against the defendant. The plaintiff was ejected from the train at Harlem, which was not a station on the defendant's road. Conceding that, under the circumstances we have detailed, the defendant had the right to eject the plaintiff from the train, we think it had no right to do so elsewhere than at some regular station on the road. Any rule or regulation of the defendant that requires or allows such an act to be done between stations to a person in the condition of the plaintiff, thus

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subjecting him to the trouble and expense of going a number of miles in order to take another train, savors too much of vindictiveness to be reasonable. We have no hesitation in saying that such a rule is unreasonable, and is therefore void so far as it applies to a case like the one under consideration. We say this without reference to the statute of 1867. Whether that statute applies to the case or not we leave undetermined.

For these reasons we think there is manifest error in the judgment of the court refusing to set aside the nonsuit that had been ordered in the case.

Others concurred.

Judgment reversed.

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38 *Connecticut*, 529.

Supreme Court of Errors of Connecticut; October Term, 1871.

Carriers. Damages for wrongful ejection of passenger. After a passenger upon a railway train had paid his fare to the conductor, the latter again demanded it, under the belief that it had not been paid, and notwithstanding the protestations of the passenger, corroborated by others near, that it had been paid, upon his refusal to pay a second time, ejected him from the train, by force and with opprobrious language. *Held*, that the conductor was liable for exemplary damages, in an action of trespass by the passenger. His honest belief that the passenger had not paid his fare, did not justify his acts and language. Before resorting to such extreme

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measures, a conductor should know that a passenger has not paid his fare.

In estimating the damages in such a case, the expenses of the plaintiff in prosecuting his suit, exceeding his taxable costs, may be considered.

Error from the supreme court of errors of Connecticut to the court of common pleas of Fairfield county.

This was an action of trespass *vi et armis*, for ejecting the plaintiff from a railway car of which the defendant was conductor. The facts are stated in the opinion. Judgment was rendered for the plaintiff. The defendant moved for a new trial, for error in the court in including in the damages the expenses of the suit.

H. B. Munson, for the motion.

Lockwood, opposed.

PARK, J.—In actions sounding in tort, if it appears that the injury complained of was inflicted wantonly or maliciously, exemplary damages may be given; and in such cases the expenses of the plaintiff in the prosecution of his suit, exceeding the taxable costs of the case, may be taken into consideration in estimating the amount of damages that the plaintiff should recover. The only question made in this case is whether it is one of this character.

It appears that the plaintiff was a passenger on a train of cars of which the defendant was the conductor; that the plaintiff paid to the defendant the usual fare of passengers from the city of Bridgeport to the town of Naugatuck; that afterwards, and before the train had arrived at the latter place, the defendant, believing that the plaintiff had not paid his fare, demanded that

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he should pay it again; that the plaintiff informed him that he had already paid his fare, and referred the defendant to the passengers who were sitting near the defendant at the time the payment was made, for the truth of his statement; that the passengers referred to corroborated the claim of the plaintiff, but the defendant still persisted that the plaintiff had not paid his fare. The remaining facts are thus detailed in the motion: "Subsequently further altercation twice ensued between the defendant and the plaintiff, the defendant insisting that the plaintiff had not paid his fare, and the plaintiff insisting that he had, and that the defendant ought to be satisfied with the proof of the payment the plaintiff had offered him. Finally, the defendant in some excitement called the plaintiff "a liar," "a scoundrel," and "a fraud," and the plaintiff in reply told the defendant that he would not dare call him such names outside of the train. On the arrival of the train at Seymour, a station between Bridgeport and Naugatuck, and near the latter, after again demanding the fare, and the plaintiff refusing to pay, and after requesting the plaintiff to leave the train, the defendant called some brakemen, and with their assistance forcibly ejected the plaintiff from the train, against his protest, although he made no active resistance, and the plaintiff was thereby obliged to take another train in order to reach Naugatuck. In the assault upon and removal of the plaintiff from the train, his coat was torn, and his clothing disarranged."

The defendant insists that he should be excused from paying more than the actual damage, on the ground that he honestly believed the plaintiff had not paid his fare. But he should have been satisfied from the evidence produced by the plaintiff that he was mistaken, and more especially there was no necessity of his using the vile epithets that he applied to the plaintiff, whether the plaintiff had paid his fare or not.

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The defendant's honest belief can not excuse the use of such epithets, and the indignity and humiliation that he inflicted upon the plaintiff in ejecting him by force from the train, where he was entitled to remain. Before resorting to such extreme measures, a conductor should know that a passenger has not paid his fare. Passengers are not to be subjected to such indignity with impunity, when the conductor has no other excuse to offer but an honest belief that a passenger has not paid his fare.

We think the court below took the right view of the case, and that the sum of sixty dollars damages falls far short of being excessive.

It is unusual for a court to state in its finding what the actual damages are in a case of this kind, and what sum is assessed in addition thereto as punitive damages, or damages arising from a consideration of the expenses that the plaintiff has been subjected to in the prosecution of his suit, exceeding the taxable costs of the case. It was probably done in this case in order to give the defendant the benefit of the claim which he makes that only the actual damages should be allowed, so that if this court should sustain his claim, a new trial might be advised conditionally, and the case disposed of without subjecting the parties to the expense and trouble of another trial.

But no division of the damages was made in the judgment that was rendered, and we think no error was committed.

A new trial is not advised.

BUTLER, Ch. J., dissented.

Others concurred.

Motion denied.

Pittsburg, &c. R. Co. v. Thompson.

THE PITTSBURG, CINCINNATI, & ST. LOUIS
RAILWAY COMPANY v. THOMPSON.

56 *Illinois*, 138.

Supreme Court of Illinois; September Term, 1870.

Carriers. Injury to passenger. The degree of care required of railroad companies to guard against injury to their passengers is, that they shall do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road.

A company can not be required, for the sake of making travel upon its road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. But the obligation of the company to provide the safest pattern of rail can not be made to depend merely upon whether a change of rail could be made without any additional expense.

Damages. Insurance. The amount of the insurance paid by an accident insurance company to a passenger injured by a railway accident should not be deducted in estimating the damages to be recovered from the railway company by such passenger for the injury. The primary liability is on the railway company.

Damages. In an action to recover from a railway company damages for personal injuries to the plaintiff, while a passenger upon the defendant's train, it appeared that the plaintiff was confined to his bed by the injuries received a period of from two to three weeks, but did not, when quiet, suffer greatly from pain. After that time he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. *Held*, if such temporary confinement and pain were the only consequences of the injury, the verdict (of \$5,000) would be regarded as excessive. But the proof being conflicting as to the extent of the injury, there being evidence from which the jury might find the plaintiff would never entirely recover, the verdict was not disturbed.

Pittsburg, &c. R. Co. v. Thompson.

Appeal to the supreme court of Illinois from the circuit court of Cook county.

This was an action on the case to recover damages for personal injuries sustained by the plaintiff while a passenger on the railroad of the defendant. The questions arising are stated in the opinion. The jury found a verdict in favor of the plaintiff, upon which judgment was entered. From the judgment the defendant appealed.

E. Walker, for the appellant.

Tuller v. Talbot, 23 *Ill.* 357; *Illinois Central R. R. Co. v. Phillips*, 49 *Id.* 234; 2 *Redf. on Railways*, 187; *Bowen v. New York Central R. R. Co.*, 18 *N. Y.* 408; *Shearman & R. on Negligence*, 296; *Weed v. Panama R. R. Co.*, 5 *Duer (N. Y.)* 192; *Fairchild v. California Stage Co.*, 13 *Cal.* 599; *Derwart v. Loomer*, 21 *Conn.* 245; *Farish v. Reigle*, 11 *Gratt. (Va.)* 697; 4 *Iowa*, 547; *Thayer v. St. Louis, &c. R. R. Co.*, 22 *Ind.* 26; *Readhead v. Midland R. Co.*, *Redf. Am. Railw. Cases*, 484; *Beisiegel v. New York Central R. R. Co.*, 4 *N. Y.* 15.

Lyman & Jackson, for the appellee.

Galena, &c. R. R. Co. v. Yarwood, 15 *Ill.* 469; *Saltonstall v. Stokes*, 13 *Pet.* 191; *Christie v. Griggs*, 2 *Campb.* 79; *Galena, &c. R. R. Co. v. Fay*, 16 *Ill.* 563; *Chicago, &c. R. R. Co. v. George*, 19 *Id.* 517; *Asten v. Heeren*, 2 *Esp.* 533; *Ingalls v. Bills*, 9 *Metc. (Mass.)* 1; *Caldwell v. Murphy*, 1 *Duer (N. Y.)* 233; *Philadelphia, &c. R. R. Co. v. Derby*, 14 *How.* 583; *Angell on Carriers*, § 569; *Hegeman v. Western R. R. Co.*, 3 *Kern. (N. Y.)* 24; *McElroy v. Nashua, &c. R. R. Co.*, 4 *Cush. (Mass.)* 402; *Curtis v. Rochester, &c. R. R. Co.*, 18 *N. Y.* 537.

LAURENCE, Ch. J.—Whether the road-bed was in

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a safe condition at the time the accident occurred, which led to the injury of the plaintiff in the present case, is a question about which the evidence is far too contradictory to permit us to set aside the verdict, because unsustained by the evidence in that particular. Indeed, the impression produced upon our minds by the record inclines us to think, as the jury have found, that the road was not in as complete repair as it should have been. It is sufficient, however, on this point, to say the evidence is very contradictory, and the verdict is not plainly against its weight.

So, too, as to the question whether the cars were precipitated from the track in consequence of the defective road-bed, admitting it to have been defective, or by reason of the inexplicable breaking of an axle apparently sound, we can only say the jury have found, and we can not decide they found erroneously. It is the theory of appellant's counsel that the cars were thrown from the track by the breaking of an axle which was, so far as could be discovered, sound. On the other hand, counsel for appellee contend that the axle was broken after the train was thrown from the track, or, if broken before, that it was in consequence of the roughness and improper condition of the road. The jury adopted one of the latter theories, and although the question is incapable of precise determination, there is, at least, this in favor of their conclusion, that one theory furnishes a cause for the breaking of the axle, while the other does not. Axles may sometimes break when the track is in good condition, and the iron without any discoverable flaw, as stated by some of the witnesses, but we can not condemn the action of the jury because it has found its verdict upon a theory which furnishes an explanation of the breaking, rather than upon one which does not. When the plaintiff showed the injury was caused by the overturning of the car, without fault upon his own part, he made out

against the company, a *prima facie* case of negligence, and placed upon them the burden of rebutting that presumption by proving that the accident resulted from a cause for which they should not be held responsible.

The chief ground relied upon, however, for a reversal of the judgment, seems to be the alleged error in the fourth instruction given for the plaintiff. This was as follows :

“ The jury are instructed, as a matter of law, that it is the duty of a railway company, employed in transporting passengers, to do all that human care, vigilance, and foresight can do, both in providing safe coaches, machinery, tracks, and roadway, and to keep the same in repair ; and if, from the evidence in this case, the jury believe that the plaintiff, while a passenger in the cars of the defendant, received an injury resulting from the negligence of the defendant, in either of the above particulars, they will find for the plaintiff and assess his damages.”

It is urged that this instruction, in requiring a company to do all that human care, vigilance, and foresight can do in providing safe coaches, machinery, tracks, and roadway, imposes upon them an obligation of unreasonable strictness and impossible of performance without subjecting all the railway companies in the country to bankruptcy. It would, for example, require them to lay steel rails instead of iron, and adopt all other possible precautions, without reference to the extravagance of the expenditure. In default of doing this they would become insurers for their passengers, except as against the acts of God and the public enemy.

The instruction, in its strict sense, is open to this objection, the true rule being, as said by this court in *Fuller v. Talbott*, 23 *Ill.* 357, that the carrier shall do all that human care, vigilance, and foresight can reasonably do, consistently with the mode of conveyance and the practical operation of the road. A company

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can not be required, for the sake of making travel upon their road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. It would be unreasonable, for example, to hold that a road-bed should be laid with ties of iron or cut stone, because in that way the danger arising from wooden ties, subject to decay, would be avoided, but, on the other hand, it is by no means unreasonable to hold that, although a railway company may use ties of wood, such ties shall be absolutely sound and road-worthy.

Still, although this instruction was, in its literal sense, erroneous, it is no ground for reversing the judgment in the present case. The defendant asked, and the court gave, the following instruction, which embodies, substantially, in another form of words, the same principle announced in the plaintiff's fourth instruction :

“ *Third.* The defendant was bound to use the utmost care and diligence in providing a safe, sufficient, and suitable means of conveyance for the plaintiff, in every thing appertaining to the mode of conveyance adopted, in order to prevent those injuries which human care and foresight could guard against ; and if, in the absence of such care and prudence, and by reason thereof, the plaintiff sustained injury, the defendant is liable to the extent of such injury.

“ On the other hand, if the injury complained of was occasioned by an internal or hidden defect in the axle of the car in which the plaintiff was at the time riding, which a thorough and careful examination would not disclose, and which could not be guarded against by the exercise of a sound judgment and the most vigilant oversight, then the defendant is not liable for the injury, if any, sustained by the plaintiff.”

There is no substantial difference between this and the plaintiff's fourth instruction, as to the degree of care required from a railway company, and we can not

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reverse for an erroneous instruction when the same instruction has been asked by the adverse party, and given at his suggestion. It is evident, indeed, from the whole record, taken in connection with this instruction asked by the defendant, that the case was tried on the question whether the accident was caused by an internal defect of the axle, which could not be guarded against by the most vigilant foresight, or was attributable to decayed ties and battered rails, and an uneven road bed; defects which can be guarded against by that reasonable degree of care for which it is admitted a railway company must be held responsible.

The fifth instruction asked by the defendant was properly refused, because one clause in it makes the obligation of the company to provide the safest pattern of rail depend merely upon whether a change of rail could be made without any additional expense.

The eighth instruction asked by defendant, directing the jury to deduct from the damages any sum paid to the plaintiff by an accident insurance company, was properly refused. If such sum was paid, it was not *pro tanto* a discharge of the railway company. The primary liability was on this company.

The only remaining question is as to the quantum of damages. The jury found five thousand dollars. It is claimed the verdict is unreasonably large. The proof is conflicting as to whether the plaintiff was injured in the membranous covering of the spine, or merely in the muscular ligaments connected with it. He was confined from two to three weeks to his bed, but did not, when quiet, suffer greatly from pain. After that period he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. If this temporary confine-

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ment and pain were the only consequences of the injury, we should not hesitate to pronounce the damages excessive. But the physician who attended the plaintiff testified that, in his opinion, the plaintiff would never entirely recover, and that, in future, any imprudence or unusual exposure, which would not affect a person in sound condition, might lead to very serious and even fatal results. Two other physicians called by plaintiff concurred in this view, while two, called by the defendant, thought the injury was only to the muscles, and not to the spine or its coverings, and that the recovery was already substantially complete. In the former view the damages can not be considered excessive, and we have no right to say the jury erred in adopting it, rather than that of the physicians called by defendant.

Judgment affirmed.

FILER v. THE NEW YORK CENTRAL RAILROAD COMPANY.

49 *New York*, 42.

Court of Appeals of New York; March Term, 1872.

Carriers. Injury to passenger. In an action against a railroad company for the recovery of damages for an injury to the person of a passenger, resulting from a single wrongful act of the defendant, evidence tending to show the character and extent of the injury and its probable results, as well as the probability of a return of the disease induced by the injury, in the ordinary course of nature, is admissible.

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Successive actions can not be maintained for the recovery of damages, as they may accrue from time to time, caused by a single wrongful act, as would be the case for a continuous wrong or a continued trespass. The party injured is entitled to recover, in a single action, compensation for all the damages, present or prospective, resulting from the injury. The limit in respect to future damages is, that they must be such as it is reasonably certain will inevitably and necessarily result from the injury.

Hence, in such a case, questions addressed to a physician, asking him to state, from his experience and medical knowledge, the probability of a recurrence of inflammation of an injured muscle, and the probable future condition of the general health of the person injured, are competent.

Evidence. Experts. In examining a medical expert the counsel propounding a hypothetical question may, for the purposes of the question, assume any state of facts within the limits of the evidence, and ask the opinion of the witness upon the facts assumed.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover damages for injuries to the wife of the plaintiff, received while a passenger on the defendant's train.

It appeared that the train on which the plaintiff's wife was a passenger, arrived at the station which was her destination, at a very late hour of the night. As the cars approached the station a brakeman called out the name of the place, and the speed of the cars was reduced until they moved very slowly, but did not stop. A passenger in advance of plaintiff's wife alighted on the platform of the depot from the cars while they were in motion. As she was waiting on the platform of the car, the brakeman said to her: "You had better get off; they are not going to halt any more." At this time the train had started with increased motion, but moved at a slow speed. As she attempted to get off, her clothes caught in the steps;

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she was thrown down and dragged a considerable distance. The shock rendered her insensible for a short time; her back was bruised, and she was lame, and suffered pain in her back and hip, which continued without intermission up to the date of the trial. This lameness and pain at length, more than two years after the injuries were received, resulted in *psoas abscess*, and prostration and sickness. She had partially recovered, but was still disabled. Besides this action by her husband, an action was also brought by the injured woman, in her own name, the opinion in which is reported *post*, 466.

Upon the trial of the action brought by her husband, the physician who attended her was allowed, against objections by the defendant, to testify as to the probability of a recurrence of the inflammation, and the probable effect upon her health; to which the defendant excepted. He was also asked the following hypothetical question:

“Assuming that in November, 1864, while attempting to alight from the cars, she (the plaintiff's wife) was thrown down and dragged upon her back for a number of feet until she became insensible, and from that time until this time there was pain in this part, and no intervening cause that you have knowledge of, what, in your opinion, was the cause of this *psoas abscess*?”

The defendant objected to this question as incompetent, improper, leading, and calling for evidence of damages which were too remote from the injury complained of. The objection was overruled, and defendant excepted.

The verdict of the jury was in favor of the plaintiff, and from the judgment entered thereon the defendant appealed to the general term. The judgment was affirmed, and the defendant appealed to the court of appeals.

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George M. Munger, for the appellant.

The evidence from the physician, as to a recurrence of the inflammation, was improperly admitted. 18 *N. Y.* 534, 542, 545; *Curtis v. Rochester, &c. R. R. Co.*, 26 *N. Y.*, 49, 53; *Drew v. Sixth Avenue R. R. Co.*; *Sedgwick on Dam.*, 108; *Lincoln v. Saratoga, &c. R. R. Co.*, 23 *Wend. (N. Y.)* 425, 435.

J. H. Martindale, for the respondent.

The opinions of medical men, founded upon the facts as to the cause and the results of the injury, were competent. *Buell v. New York Central R. R. Co.*, 31 *N. Y.* 320; *People v. Lake*, 2 *Ker.* 362; *Curtis v. R. & S. R. R. Co.*, 20 *Barb.* 391.

Prospective damages are recoverable in this action. Cases before cited; 2 *Redf. on Railways*, 220; *Hopkins v. Atlantic, &c. Railway*, 36 *N. H.* 9.

Plaintiff was entitled to recover for loss of services of his wife. *Reeves' Dom. Rel.*, ch. 4, p. 63; *Laws* 1860, ch. 90.

ALLEN, J.—Successive actions can not be brought by the plaintiff for the recovery of damages, as they may accrue from time to time, resulting from the injury complained of, as would be the case for a continuons wrong or a continued trespass. The action is for a single wrong, the injury resulting from a single act, and the plaintiff was entitled to recover not only the damages which had been actually sustained up to the time of the trial, but also compensation for future damages; that is, compensation for all the damages resulting from the injury, whether present or prospective. The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury. To exclude damages of that character, in actions for injuries to the person, would necessarily, in many cases, deprive the injured party

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of the greater part of the compensation to which he is entitled. *Curtis v. R. & S. R. R. Co.*, 18 *N. Y.* 534; *Drew v. Sixth Ave. R. Co.*, 26 *N. Y.* 49. Any evidence, therefore, tending to show the character and extent of the injury and its probable results, as well as the probability of a return of the disease induced by the injury, in the ordinary course of nature, and without any extrinsic superinducing cause, was competent to enable the jury to determine the compensation to which the plaintiff was entitled.

In the case of a fractured limb, it was thought that the present and probable future condition of it were proper matters of inquiry. *Lincoln v. Saratoga, &c. R. R. Co.*, 23 *Wend. (N. Y.)* 425. The consequences of a hypothetical second fracture were deemed too remote. The question to Dr. Faling as to the probability, from his experience and medical knowledge, of a recurrence of an inflammation of the injured muscle, and his answer that he could not say the probabilities were very strong, but that he should feel, speaking from experience, that there was danger of the return of the inflammation and accumulation of the fluid, was competent.

The evidence was that of a medical expert, as to the ordinary or probable course of disease in the injured muscle, which had resulted directly from the injury complained of, and related to the future condition of the person injured, so far as that condition could be ascertained from medical learning and experience. So, too, the opinion of the same physician, that he should expect, if there were no return of inflammation, that the general health of Mrs. Filer would improve, but would always be somewhat impaired, was proper and competent, to enable the jury to ascertain the actual extent of the injury to the plaintiff.

There is no evidence other than that of experts by which courts and juries can determine whether a disease

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or an injury has been or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future. The hypothetical opinion of Dr. Hillman as to the cause of the abscess was competent, and the answers, cautiously given, that if they could find no other cause, they would naturally attribute it to the injury complained of, and that such injury received in 1864 was competent to produce the condition he saw in 1867, were properly allowed.

Some latitude must necessarily be given in the examination of medical experts, and in the propounding of hypothetical questions for their opinions, the better to enable the jury to pass upon the questions submitted to them. The opinion is the opinion of the expert, and if the facts are found by the jury as the counsel by his questions assumes them to be, the opinion may have some weight, otherwise not. It is the privilege of the counsel in such cases to assume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed. The facts are assumed for the purposes of the question, and for no other purpose.

There was no error in the refusal to charge as requested.

The question submitted was whether the abscess and consequent illness were caused by the injury received in November, 1864, and if that was found in the affirmative, the plaintiff, if the other facts were found in his favor, was entitled to recover. There was no evidence authorizing the submission of the question whether the abscess might not have been in part caused by the injury spoken of, and in part by some other means. The other questions made upon this appeal are considered and disposed of in the action at the suit of Helen M. Filer.*

* Reported, *post*,

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There was no error upon the trial, and the judgment must be affirmed.

CHURCH, Ch. J., having been of counsel in the case, did not vote.

Others concurred.

Judgment affirmed.

FILER v. THE NEW YORK CENTRAL RAIL-ROAD COMPANY.

49 *New York*, 47.

Court of Appeals of New York; March Term, 1872.

Carriers. Injury to passenger. Contributive negligence. The plaintiff, a female passenger upon the defendant's train, had purchased a ticket and taken passage for a station at which the train was advertised to stop. On approaching the station the name of the place was called, and the speed of the train greatly reduced, but it did not stop. The defendant's brakeman directed the plaintiff to get off, he saying that the cars would not stop. Another passenger alighted safely, and the plaintiff attempted to follow, but her dress caught in the steps, and she was thrown down and injured. *Held*, that leaving the cars, under the circumstances, was not, as a matter of law, negligence contributing to the injury, but the question was proper for the jury.

The question of concurrent negligence is to be determined by the particular circumstances of each case, and is, ordinarily, a question for the jury. And the defendant having involved the plaintiff in the attempt to get off the cars while in motion, and compelled her to choose instantly between doing so and being carried beyond her

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destination, she ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong.

Married women. Damages for personal injury. In an action by a married woman against a railroad company, to recover damages for personal injuries caused by the defendant's negligence, the plaintiff can not, under the laws of New York relating to married women and their separate property, recover consequential damages resulting from her inability to labor, unless she is carrying on a trade or business, or performing labor or services, upon her sole and separate account. Her services and earnings belong to her husband, and he may have an action for their loss.

Appeal to the court of appeals of New York from the general term of the supreme court in the fourth judicial department.

This was an action to recover damages sustained by the plaintiff, a married woman, alleged to have been occasioned by the defendant's negligence. The facts are stated in the opinion, and also in the report of the preceding case, which was an action for damages by the husband of the plaintiff in this case.*

Upon the trial, at the close of the evidence, the defendant moved for a dismissal of the complaint, on the ground that no negligence by the defendant had been shown, and that negligence on the part of the plaintiff, contributing to the injury, had been shown. The motion was denied, and the defendant excepted.

In his charge to the jury, the judge directed that if they found a verdict for the plaintiff, the amount should include damages for her pain and suffering, and for any disqualification for labor, or the exercise of her natural powers, resulting from the injury; to which the defendant excepted.

The verdict was for the plaintiff, and from the judgment entered thereupon the defendant appealed

* See *ante*, 460.

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to the general term, which affirmed the judgment; and the defendant appealed to the court of appeals.

George G. Munger, for the appellant.

The plaintiff was chargeable with such contributory negligence as precludes her from recovery. *Lucas v. Taunton, &c. R. R. Co.*, 6 *Gray*, 64; *Hickey v. Boston, &c. R. R. Co.*, 14 *Allen*, 429; *Timmons v. Central Ohio R. R. Co.*, 6 *Ohio*, 105; *Ohio, &c. R. R. Co. v. Schiebe*, 44 *Ill.* 460; *Pennsylvania R. R. Co. v. Aspell*, 23 *Pa.* 147; *Same v. Kilgore*, 32 *Id.* 292; *Davis v. Chicago, &c. R. R. Co.*, 18 *Wis.* 175; *Chicago, &c. R. R. Co. v. Hazard*, 26 *Ill.* 373; *Shearman & Redf. on Negligence*, § 281.

The court erred in refusing to charge that if the plaintiff had neglected to take reasonable care of herself since the injury, it was to be taken into account by the jury in estimating damages. *Douglas v. Stephens*, 18 *Mo.* 362, 366; *Sherman v. Fall River Iron Works*, 2 *Allen*, 524; *Thomas v. Kenyon*, 1 *Daly*, 132.

J. H. Martindale, for the respondent.

It was the duty of defendant to stop the train at the station. *Story on Bailments*, 600.

The question of contributory negligence was one of fact, and for the jury. *McIntyre v. New York Central R. R. Co.*, 37 *N. Y.* 288, 289; *Pennsylvania R. R. Co. v. Kilgore*, 32 *Pa.* 292.

A portion of the charge excepted to was clearly proper. A general exception, therefore, must fail. *Haggart v. Morgans*, 1 *Seld.* 322; *Jones v. Osgood*, 2 *Id.* 233; *Hart v. R. & S. R. R. Co.*, 4 *Id.* 37; *Caldwell v. Murphy*, 1 *Kern.* 416; *Walsh v. Kelly*, 40 *N. Y.* 557.

It was proper to consider, in estimating damages, plaintiff's disqualifications for labor. *Laws 1860*, ch. 70, § 7; *Laws 1862*, ch. 172.

The question as to the husband's right not called to

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the attention of the court, and can not be raised here. *Magee v. Badger*, 34 *N. Y.* 248.

ALLEN, J.—It was submitted to the jury, if they found that the plaintiff was directed by the brakeman to leave the cars, or to get off when the cars were in motion, to determine whether under the circumstances there was any such negligence on her part as would preclude her from recovering; the judge having in substance instructed the jury that if a person seeks to recover for injuries resulting from the negligence of another, he must himself be free from any negligence contributing to the injury. The question was put to the jury, whether the plaintiff acted as prudent persons generally would have acted under the circumstances, and the charge was that, if she did, that would not bar a recovery.

There is no complaint of the manner in which the question as to the alleged contributory negligence of the plaintiff was submitted to the jury, if there was any question for submission. The claim of the defendant is, that the complaint should have been dismissed, or a verdict ordered against the plaintiff, upon the ground that she was culpably careless and negligent, and by her carelessness and negligence contributed to the injury, and that, there being no dispute as to the facts, the question was one of law for the court and not of fact for the jury.

Ordinarily the question of negligence is one of mixed law and fact, and it is the duty of the court to submit the same to the jury, with proper instructions as to the law. What is proper care is sometimes a question of law, when there is no controversy about the facts; but where there is evidence tending to prove negligence on the part of the defendant, and a question arises whether the plaintiff has by his own fault contributed to the injury, it is ordinarily a question for the jury. If the

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evidence is of that character that a verdict for the plaintiff would be clearly against evidence, the question is one of law and should be decided by the court.

The fact is undisputed that the plaintiff received the injury while attempting to get off the cars while they were in motion, making very slow progress, and the jury have found that she was directed by the brakeman on the cars to get off, and was told by him that they would not stop or move more slowly to enable her to do so. That it was culpable negligence on the part of the defendant to induce or permit the plaintiff to leave the train while in motion, and a gross disregard of the duty it owed her, not to stop the train entirely and give her ample time to pass off with her luggage, is not disputed. Notwithstanding this, if the plaintiff did not exercise ordinary care, and might with ordinary care and prudence have avoided the injury, she is precluded from recovering.

The degree of negligence of which the parties are respectively guilty, or whether the fault of the defendant was a breach of contract or the mere omission of some duty resting upon it as a carrier of passengers, is not material.

The plaintiff's negligence may have been slight and that of the defendant what is ordinarily termed gross; but if the plaintiff's fault directly and proximately contributed to the injury, she can not recover.

Indeed, it is now said that there is no difference between negligence and gross negligence, the latter being nothing more than the former, with a vituperative epithet. *Grill v. Iron Screw Collier Co.*, *L. R.*, 1 *C. P.* 600; *Wilson v. Brett*, 11 *Mees. & W.* 113.

That there is more hazard in leaving a car while in motion, although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt depends upon circumstances; and where a party, by the wrongful act of

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another, has been placed in circumstances calling for an election between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard.

The plaintiff had purchased a ticket and taken passage for Fort Plain, at which place this train was advertised to stop, and, on approaching the station, the name of the place was called as a notice to the passengers intending to leave the train at that place to be prepared to get off, which was equivalent to notice that proper time and facilities would be afforded them for their passage from the cars, and the speed of the cars was reduced very greatly, so that the baggage was removed and taken from the baggage car by the porter; one man, supposed to be a little lame, had gotten off safely.

The plaintiff was told that the cars would not make any other stop, and that she must get off there, and in attempting to do so she was injured.

She was put to her choice, without any fault of hers, whether to obey the advice and suggestion of the defendant's servant, and follow the example of the man who had preceded her, or to remain on the cars and be carried beyond the place of her destination, and away from her friends, and it was a proper question for the jury whether this was or was not, under the circumstances, an act of ordinary care and prudence.

It is true, there was no absolute necessity for this act; but she was called upon to decide upon the instant, and under peculiar circumstances, and ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong. If, in leaving the cars, she did not exercise the care and caution which she might and ought to have done, and was careless and negligent in

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her movements, or in the care of her dress, and by reason of such want of care caused or contributed to the injury, she ought not to recover; but no question was made at the trial upon this branch of the case, except upon the effect of her leaving the cars when in motion.

Had the cars been going at a rapid rate, the plaintiff must have known that she would be injured by leaping from them, and the attempt to leave the cars, under such circumstances, even at the instance of the railway servants, would have been a wanton and reckless act, and no recovery could have been had against the defendant. In *Lucas v. New Bedford, &c. R. R. Co.*, 6 *Gray*, 64, the plaintiff had accompanied a friend to the cars and remained with her until the train had started, and then of her own volition attempted to leave and received an injury, and it was held that her own act was the cause of the injury, and that the defendant was in no respect in fault.

In *Hickey v. Boston, &c. R. R. Co.*, 14 *Allen*, 429, the plaintiff's intestate took a position upon the platform of a car as it was coming into a station, where he was exposed to danger, voluntarily and without reasonable cause of necessity or propriety, and it was properly held that the express or implied assent and permission of the conductor of the train did not change the relation of the parties and relieve the deceased from the consequences of his own want of care. *Railroad Co. v. Aspell*, 23 *Pa.* 147, differed essentially in all its circumstances from the case at bar. The plaintiff there leaped in the dark from a train of cars while under a high rate of speed, against the remonstrances of the persons in charge of the train, and under an assurance that the train would be stopped to permit him to alight. It was properly held a wanton and reckless act, precluding a right to recover against the railroad company. In the same case the principle was recognized that if a passenger was

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ordinarily careful and attentive to his own safety, and was injured by the negligence of the company, he might recover: *Pennsylvania R. R. Co. v. Kilgore*, 32 *Pa.* 292, is more analogous to the case in hand. A female passenger, accompanied by three young children, on arriving at an intermediate station proceeded to alight with them. Two of the children had left the car, and whilst the plaintiff was still upon the train the cars started, when she sprang upon the platform on which one of the children had fallen prostrate, and was injured. She was allowed to recover. It was held that the question of concurrent negligence was to be determined by the particular circumstances of the case. There, as in this case, the defendant had involved the plaintiff in the attempt to get off the cars; and her efforts, made with proper care under all the circumstances, can not be imputed to her for negligence.

It is not denied that the attempt to leave the cars while they are in motion is wrong. But, as said by Judge WOODWARD, in the case last cited, "it is one thing to define a principle of law, and a very different matter to apply it well. The rights and duties of parties grow out of the circumstances in which they are placed."

McIntyre v. New York Central R. R. Co., 37 *N. Y.* 287, is, in principle, analogous to this, and a recovery was had for injuries received by a passenger in passing in the evening, and under circumstances increasing the hazard of the undertaking, from one car to another while the train was in motion, the attempt having been made by direction of the defendant's servants, and to obtain a seat, which could not be had in the car in which the passenger was. A passenger voluntarily and without necessity making such an attempt and receiving an injury, would be held to be at fault and without remedy; but the peculiar circumstances of the case took it out of the general rule. In *Foy v. London*,

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&c. R. R. Co., 18 *C. B. N. S.* 225, a recovery was had for an injury received in alighting from the cars, caused by the insufficient means of alighting furnished by the company, although the hazard of the attempt was as patent to the plaintiff as to the servants of the company. The jury there found that the defendant was guilty of negligence in not having provided conveniences for getting down from the carriage, and negatived the claim that the passenger contributed to the accident.

The court in banc sustained the recovery and refused leave to appeal, saying: "We do not think this a fit case for an appeal." In that case, the lady was desired by a porter in the employ of the company to alight; and that circumstance was held by the court to distinguish it from a subsequent case. *Siner v. G. W. R. Co.*, *L. R.* 3 *Exch.* 150; affirmed in exchequer chambers, 17 *W. R.* 417.

The case was similar in all its circumstances to Foy's Case, except there was no direction or request by the company's servants to the lady to get down from the carriage. The court held, against the dissent of KELLY, Ch. B., in the court of exchequer, and Justice KEATING, in the exchequer chambers, that there was no evidence of negligence to go to the jury. Chief Baron KELLY was of the opinion that the stopping of the train, without any notice to the passengers to get out, was an invitation to them to do so; that the descent, although dangerous, was not so clearly dangerous that the plaintiff might not properly encounter the risk; and that the company, having wrongfully put the passengers to the necessity of choosing between two alternatives, the inconvenience of being carried on and the danger of getting out, they were liable for the consequences of the choice, provided it was not exercised wantonly or unreasonably. The reasoning of the chief baron applies with force to this case, and is in

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harmony with *McIntyre v. New York Central R. R. Co.*, *supra*. The danger here was not certain, and the defendant can not complain that the plaintiff did, under the circumstances, encounter some degree of peril, the jury having found that it was not imprudent for her so to do, and was encountered at the instance of the brakeman on the cars.

If the injury was caused by the awkward and careless manner in which the plaintiff got down from the cars, a different question would be presented. The motion for a nonsuit was properly denied.

Upon the question of damages, the jury were instructed to give the plaintiff, if the questions of fact were found in her favor, such an amount of damages as they thought she was entitled to for the pain and suffering consequent upon her injury, and for any disqualification for labor in the exercise of her natural powers. A distinct exception was taken to that part of the charge which included, as an item of damages proper to be allowed, the plaintiff's disqualification to labor. The attention of the court being distinctly called to the precise point presented, an opportunity was given to qualify the charge and limit its application, if anything less was intended than the language would clearly import.

It was not qualified or explained, and must be held as an instruction, that the plaintiff was entitled to recover consequential damages resulting from her inability to labor. That was put forth as a distinct item of damages proper to be allowed, and was not referred to as evidence of the extent of the injury and consequent pain and suffering.

There was no claim that the plaintiff was, at the time of the injury, carrying on any business, trade, or labor, upon or for her sole and separate account. Her services and earnings belonged to her husband; and for loss of such services, caused by the accident, he

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may have an action ; and another record before us shows that he has recovered for them, as he lawfully might do. *Reeves' Dom. Rel.*, Parker's ed. 138, and cases cited, marg. p. 63. The *Laws of 1860*, ch. 90, permit a married woman to carry on any trade or business, and perform any labor or services on her sole and separate account, and give to her her earnings from her trade, business, labor, or service ; and she is authorized to sue for any injury to her person or character, the same as if she were sole. This is for the direct injury, and for direct and immediate damages, unless she is, on her own account, and for her own benefit, engaged in some business in which she sustains a loss.

The amendatory act of 1862, ch. 172, does not enlarge the rights of the wife, or detract from the rights of the husband, or take from him the right to recover for the loss of service of his wife, caused by the wrongful act of another.

Consequential damages are in all cases limited to the amount actually sustained ; and unless the wife is actually engaged in some business or service in which she would, but for the injury, have earned something for her separate benefit, and which she has lost by reason of the injury, she has sustained no consequential damages ; she has lost nothing pecuniarily by reason of her inability to labor. The recovery was large, and was probably affected by the instruction that the inability of the plaintiff to labor constituted one of the items of damage to be taken into account by the jury.

For this error in the charge, the judgment should be reversed, and a new trial granted.

CHURCH, Ch. J., did not sit.

Others concurred.

Judgment reversed.

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PHILLIPS v. THE RENSSELAER & SARATOGA
RAILROAD COMPANY.

49 *New York*, 177.

Court of Appeals of New York; April Term, 1872.

Carriers. Injury to passenger. Contributive negligence. The plaintiff, having purchased a ticket for passage upon defendant's railroad, attempted to get upon the train while it was slowly passing the station. The platform being crowded with passengers, he could only get on the lower step, from which he was thrown by a jerk of the cars ; but he continued holding on and running beside the train, endeavoring to recover his place, the speed of the train increasing, until he struck against a platform near the track and was injured. *Held*, that his own act so contributed to the injury that a nonsuit in an action by him for the resulting damages was proper. And his negligence was not excused by the facts that some one on the train called out the name of the station, and that others were getting upon the train while in motion, and that the plaintiff and others had previously got on and off trains while in motion at the same station.

Appeal to the court of appeals of New York from the general term of the supreme court in the third judicial department.

This was an action to recover damages for personal injuries received by the plaintiff, while endeavoring to get upon the defendant's train. The facts in the case, as shown by the plaintiff's testimony, are stated in the opinion. At the close of the plaintiff's evidence, the defendant moved for a nonsuit, which was granted. The plaintiff appealed to the general term, which set aside the nonsuit and ordered a new trial. From this order the defendant appealed to the court of appeals.

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John H. Reynolds, for the appellant.

Lyman Tremain, for the respondent.

GROVER, J.—The question arising upon the exception to the nonsuit, ordered by the judge upon trial, is whether the jury would have been warranted in finding from the evidence that the injury received by the plaintiff resulted from the negligence of the defendant or its servants, and that he was free from any negligence contributing thereto. The inquiry as to the plaintiff is whether it was negligence in him to attempt to get upon the train while in motion under the circumstances which the evidence showed, as no question can be made but that such attempt contributed to the injury. The plaintiff testified in substance that he bought a ticket and that a train soon after came along, slowed up but did not stop, but passed along, some one on board hallooing that there was to be another train along. That the station where he bought the ticket was the west side of the track, but that there was no platform there, from which passengers could get upon the cars. That there was quite a crowd there, and upon the approach of the train in question, he and some others went over to the east side of the track, thinking they could more readily get upon the train from there. That the cars came and slowed down, and, as he started to get on, they had about stopped; others began to jump on; ahead of him a good many were jumping on. That the brakeman called out West Troy (name of the station). That they were getting on all along the cars. That he got on the step, two men got on ahead of him, and he could not get any further up. That the cars were then jerked ahead and jerked him off the step, but he did not let loose of the handle. That he recovered back, and when they were on pretty good speed, they jerked very powerful. The handle was the iron rod. That he

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got on because he saw others getting on, so he recovered back upon the step, but had no more than recovered back before he was knocked off by the platform, and rolled in between the car and the platform. That the cars were going very slow when he got on, but the second time were going pretty good speed. That he did not see or know anything about the platform until he struck it. It was proved that this platform was a structure of the height of the floor of the cars, the front of which was seven inches from the outside of a car upon the track, erected and used only for the purpose of loading and unloading freight. It was further proved that the distance from where the plaintiff first attempted to get upon the car to the platform, was about sixty feet. To attempt to get upon the car while in motion, the platform and steps of which were so crowded that he could not get upon the platform if he succeeded in getting upon the lower step; to persist in such attempts, when, by the jerking of the cars, he was thrown from the step; to hold on to the iron and run along, trying to get upon the car while the speed was increasing, without looking to see if there was danger of collision with some object near the track or other danger to be apprehended, was not only negligence, but exhibited great if not reckless disregard of his safety by the plaintiff. This was the conduct of the plaintiff, as testified to by himself, and was such that, without explanation, a verdict finding him free from contributory negligence would have been unauthorized. Unless evidence was given tending to prove facts explaining and justifying this conduct of the plaintiff, the nonsuit was proper. The plaintiff proved that the name of the station was called on board of the train before he attempted to get on. This furnished no excuse for the plaintiff. This call was to notify those on board wishing to stop at that station, so that they could be in readiness to get off but would not excuse them from the impu-

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tation of negligence in jumping off with a crowd, while they knew not only that the train was in motion, but jerking up and increasing its speed. The plaintiff knew all this, and still persisted in his attempt to get into the car. *Whittaker v. Manchester R. R. Co., Eng. Com. Pleas*, cited by counsel from the *London Times*, has no analogy to the present case. There the plaintiff was a passenger upon the train, on a dark night, and upon the name of the station where he wished to get off being called, opened the door and stepped upon what he believed to be the platform, but which in fact was the parapet of a bridge, and fell over. *Held*, that a verdict in his favor should be sustained. The fact that others were getting upon the train in a manner equally reckless as the attempt made by the plaintiff affords no justification for him. An excited crowd, eager to get on board, each ahead of the other, too impatient to wait until the train stops, make the attempt, each at his own risk, and no one is excused by the numbers making the attempt. Under such circumstances the cry of those on board of the train that it will stop, and giving warning of the danger, will be unheard, as it was by the plaintiff in this case, or unheeded if heard. If people will encounter such risks, the law can not relieve them against the consequences. The plaintiff further gave evidence tending to show, and notwithstanding the evidence to the contrary the court must assume as true, that on some previous occasions the defendant had slowed trains at this station and passengers had got off and others had got on, when the trains did not come to a full stop at all. This was reckless on the part of the company, if sanctioned by the directors, and if not by those in charge of the train; and if, while so doing, any person should be killed, it is clear that those responsible therefor might be convicted of manslaughter under the statute. But such reckless conduct of the company, or of those

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managing its trains, does not justify any person in rushing at the trains at that station while moving, and attempting to get on, and; when thrown from the steps by the jerking of the cars, hanging on to the irons, and continuing ineffectual attempts to get on for rods, and until he is injured by a collision with some object outside of the cars. No prudent man would voluntarily encounter such risks. The counsel cites *Shearman & Redfield on Negligence*, § 282, for the purpose of showing that a person is not chargeable with negligence in attempting to get upon a horse car in moderate motion when the driver refuses to stop; but should he make the attempt and fail, and then hang on, running outside of the car until he came in collision with a vehicle, the case would be different. The counsel is correct in the position that if the evidence offered by the plaintiff and improperly excluded, in connection with that given, would have authorized the jury to find a verdict in his favor, the order must be affirmed. The evidence so offered was that the plaintiff had, before that, got off and on at this place when the cars stopped no more than at this time, and he had knowledge that they frequently did not stop any more than as they slowed down this time. This must be considered in connection with the fact indisputably proved that the train in question did in fact stop upon arriving at the proper place for that purpose, and that it was intended so to stop. So considered, the facts offered did not excuse the conduct of the plaintiff when he found himself thrown from the step by the jerking of the cars; that the speed was increasing. Ordinary prudence required him to abandon the attempt instead of hanging on and continuing it until he came in collision with the platform. If the train did not stop so as to enable him safely to get on, he had his remedy against the defendant. The order appealed from must be reversed, and the judgment given upon the nonsuit.

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CHURCH, Ch. J., dissented.

PECKHAM, J., did not vote.

Others concurred.

Order reversed, and judgment ordered for defendant upon the nonsuit.

BARTON v. THE ST. LOUIS & IRON MOUNTAIN RAILROAD COMPANY.

52 *Missouri*, 253.

Supreme Court of Missouri; March Term, 1873.

Carriers. Injury to passenger. Contributory negligence. The mere inadvertent protrusion of the arm of a passenger from the window of a railway car is not, as matter of law, such negligence on his part as will defeat his action for damages for an injury which could not have happened but for such act of his. The question whether such inadvertence is culpable under the circumstances of the particular case, should be submitted to the jury.

Appeal to the supreme court of Missouri from the circuit court of St. Louis county.

This was an action to recover damages for a personal injury to the plaintiff, sustained while a passenger upon the train of the defendant. The facts appear in the opinion. The jury found a verdict for the plaintiff. A motion by the defendant for a new trial

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was overruled, and judgment for the plaintiff entered on the verdict. From the judgment the defendant appealed.

Dryden & Dryden, for the appellant.

Cline, Jamison, & Day, for the respondent.

EWING, J.—This is an action for damages for an injury received by the plaintiff while a passenger on one of defendant's cars. The evidence tended to prove that when injured the plaintiff was sitting in the rear car of the train, at or near an open window, and that the injury to his arm was caused by the car coming in contact with a wagon loaded with a skiff among other things. As to the position of his arm at the time, whether inside or protruded out of the window, the evidence was somewhat conflicting.

There was a verdict and judgment for the plaintiff, and a motion for a new trial being overruled, the cause is brought to this court by appeal.

The court gave the following instructions to the jury at the instance of the plaintiff:

1. If the jury find that plaintiff was injured as charged in the petition, while being transported as a passenger in defendant's car from the city of St. Louis to the town of Carondelet, and that it was caused by the carelessness of defendant's agents and servants in running, conducting, and managing said car, or the train to which it was attached, without any fault, misconduct, or negligence on the part of plaintiff immediately contributing thereto, then they must find for the plaintiff.

2. Although plaintiff may have failed to exercise ordinary care and prudence, while a passenger on defendant's car, which may have contributed remotely to the injury complained of, yet if the employees of

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defendant were guilty of negligence, which was the direct and immediate cause of the injury, and might have prevented it by the exercise of prudence and care, the defendant is liable.

The court refused to give the following instructions, asked for by defendant :

1. That although the jury may find from the evidence, that the plaintiff while riding as a passenger in defendant's car was injured, by having his arm broken, yet if they further believe from the evidence, that at the time such injury happened the plaintiff's said arm was by the inadvertence of the plaintiff protruded through and out of the window of the said car, and that but for his said arm being thus out of said window, the plaintiff could not and would not have received the injury complained of, the verdict should be for the defendant.

2. The court instructs the jury, that although they may believe from the evidence, that the plaintiff while riding as a passenger in defendant's car was injured by having his arm broken, yet if they further believe from the evidence, that at the time such injury happened plaintiff's arm was by the inadvertence or carelessness of plaintiff protruded through and out of the window of said car, and that plaintiff was guilty of negligence in thus placing his said arm, contributing directly to the injury complained of, the verdict should be for the defendant.

The court gave the following instruction, namely :

That although the plaintiff was injured by having his arm broken, yet if at the time of said injury, plaintiff by negligence or carelessness had his arm out of the window of said car, and that such negligence or carelessness contributed directly to the happening of such injury, the verdict should be for the defendant.

The principal question arises upon the first instruction asked by the defendant ; whether the hypothetical

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facts of that instruction constituted negligence *in se* and barred a recovery. The instruction virtually assumes that it was immaterial in what manner or from what cause the collision which produced the injury occurred ; that the protrusion of the arm of plaintiff out of the car-window was negligence, which must defeat the action, if in the language of the instruction the injury *could not* and *would not* have happened but for this act of the plaintiff.

It also assumes that there was no evidence of negligence on the part of the defendant or its employes ; that the fact of an obstruction being on or near the track was not to be considered by the jury in passing upon the question of negligence ; that the defendant had no duty to perform in keeping a lookout for obstructions of this nature ; that although the engineer may have seen the wagon on or near the track before the collision occurred, it was not his duty to stop the train, or endeavor to do so, to avoid the danger. It also assumes as immaterial the fact that the collision happened at a place on the track and under circumstances which were not calculated to excite any apprehension of danger in the mind of a man of ordinary prudence, who was a passenger, and situated as plaintiff was, or to call for extraordinary care on his part ; and that no reasonable degree of vigilance could have foreseen or anticipated it. It also further assumes that the collision, sufficient to tear off the battings from the car, and also the hind steps of the car, could not have been the cause of the very act of the plaintiff, which is imputed to him as culpable negligence or inadvertence ; that the force could not have been applied to the car in such a manner as to have irresistibly forced plaintiff's arm outside of the window ; or that it could not have been an involuntary or mechanical movement, prompted by an instinctive shrinking from imminent danger, the nature of which he may have been

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equally disqualified at the time to comprehend or guard against.

All these circumstances were virtually excluded from the consideration of the jury by the instruction; and they had a bearing directly or remotely on the question of negligence.

The negligence, which will prevent a recovery in such cases, is nothing more than the absence of proper care, such care as a person of ordinary prudence would exercise under similar circumstances; and this question is almost always more or less affected by the conduct of the defendant; a solution of it is rarely found in the conduct of the complaining party alone.

Inadvertence is not necessarily culpable. It may be so, or not, according to circumstances. The instruction assumes that it *was culpable* in the case before us. Negligence of such a character as to defeat the action is predicated of an act of inadvertence, which as we have seen may have been caused by the misconduct of the defendant, which misconduct the jury under the instruction would not have been permitted to consider. The evidence as already observed was conflicting as to the position of plaintiff's arm at the time the collision occurred, and also as to facts which tended to show negligence on the part of the defendant. Upon the state of facts thus disclosed the defendant insists that the question of negligence should have been taken from the jury, and that the court should have declared as a matter of law, that if the plaintiff's arm was protruded through the window by inadvertence, and the injury could not have resulted but for that act, there could be no recovery.

The proposition is that negligence is a question for the court, not the jury. On this question there is an apparent conflict of authority, but it is only apparent, so far as I have seen, with few exceptions.

In the state of Connecticut it seems to have been

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held in one case, that negligence is so peculiarly a question of fact, that it should be left to the jury even on a conceded state of facts. 19 *Conn.* 566.

This in my view is erroneous. Whether it is a question for the court or the jury must be determined by the facts of the particular case. Negligence is in all cases in a certain sense a question of fact for the jury; that is, it is for the jury to determine whether the facts bearing upon the question exist or not. But when the facts are undisputed, or are so clearly proved as to admit of no doubt, it is the duty of the court to apply the law without submitting the question to the jury. This involves no invasion of the province of the jury, nor any infringement of their legitimate functions, no more than when the court passes upon a demurrer to the evidence, or on motions for new trials upon the ground of the want of any evidence to sustain the verdict of a jury.

In *Keller v. New York Central R. R. Co.*, 24 *How. (N. Y.) Pr.* 172, this view is aptly expressed by the learned judge, who says: "When the facts are so clear and decided, that the inference of negligence is irresistible, it is the duty of the judge to decide; but when the facts or the inference to be drawn from them are in any degree doubtful, the only proper rule is to submit the whole matter to the jury under proper instructions."

The only difficulty is in making a proper application of it to the particular case. The cases cited by counsel from Indiana, North Carolina, and Pennsylvania, as I view them, are not inconsistent with this rule. There is nothing in those cases, in my opinion, that warrants the deduction, that negligence is always a question for the court, and not for the jury.

In the case of *Pittsburg C. R. R. Co. v. McClurg*, 56 *Pa. St.* 300, the evidence was not before the court, but it appeared from the record, that the plain-

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tiff, McClurg, while a passenger on defendant's train of cars, suffered his elbow to project from the window of the car in which he was a passenger, and in passing a switch it came in contact with a car standing on the switch, and was broken. The court held upon this state of facts, as matter of law, that plaintiff was guilty of a want of due care, which would prevent him from maintaining the action. The court say, where a traveler puts his elbow or an arm out of a car-window voluntarily, *without any qualifying circumstances impelling* him to it, it must be regarded as negligence *in se*, and when that is the *state of the evidence*, it is the duty of the court to declare the act negligence in law!

In some of the decisions of this court, language is employed to the effect, that the question of negligence is peculiarly and exclusively for the jury; but such language must be interpreted, in view of the facts of the case, as they affect that question—not as legal propositions of universal application. There is an exception, however, in the case of *Huelsenkamp v. Citizens' R. Co.*, 34 *Mo.* 54. The learned judge says, in delivering the opinion of a majority of the court: "A court can not direct a jury that such or such supposed facts show negligence, or that such other supposed facts do not show negligence." The proposition here asserted is, that upon no state of facts is it the right or province of the court to apply the law, or pronounce the legal effect of facts affecting that question, however clearly proved, or even if they were undisputed. Such a proposition, as we have endeavored to show, is untenable.

The case of *Devitt v. Pacific R. R. Co.*, 50 *Mo.* 302, is not in conflict with the rule above stated. The facts in that case, affecting the question of negligence of the deceased—who was an employe, at the time, of the company—were undisputed; and the court held

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that it was a proper case, therefore, for instructing the jury, that certain enumerated facts (which, unlike the case at bar, were *all the facts*), if found to exist, constituted such contributory negligence as would prevent a recovery; and properly held the refusal to give such an instruction erroneous; there being no doubt as to the facts, nor as to the inference to be drawn from them, it was the duty of the court to declare their legal effect.

The instructions given by the court, taken together, present the law applicable to the case, very fully and clearly.

The only remaining point is the refusal of the court to give an instruction in the nature of a demurrer to the evidence at the close of plaintiff's testimony. In this the court committed no error. The evidence adduced by the plaintiff showed that the injury to his arm was caused by a collision of the car with a wagon and skiff near the track, in the manner already described, and that the engineer could have seen this obstruction at the distance of some two hundred yards; that no warning was given by him to put on the brakes, and that the train might have been "broken up," or stopped, by the time it reached the obstruction.

Upon this state of facts, the court properly refused to give the instructions asked.

Others concurred.

Judgment affirmed.

Burns v. Bellefontaine R. Co. of St. Louis.

BURNS v. THE BELLEFONTAINE RAILWAY
COMPANY OF ST. LOUIS.

50 *Missouri*, 189.

Supreme Court of Missouri; March Term, 1872.

Carriers. Injury to passenger. Contributive negligence. The fact that a passenger upon a street railway voluntarily places himself upon the front platform of the car, when there is room for him inside the car, does not, as a matter of law, absolve the railway company from liability for injuries received by such passenger in getting off the front platform. Contributive negligence can not be presumed from that circumstance.

Appeal to the supreme court of Missouri from the circuit court of St. Louis county.

This was an action to recover damages for a personal injury to the plaintiff received in alighting from one of defendant's street cars by the front platform. The facts are stated in the opinion. The jury found a verdict for the plaintiff, and judgment was entered thereon. From the judgment the defendant appealed.

Krum & Patrick, for the appellant.

Bakewell & Farish, for the respondent.

ADAMS, J.—The plaintiff recovered a judgment for damages growing out of injuries to plaintiff in getting off the front part of one of its cars. There seems to have been some defect in the brakes, so that in going down a steep grade the cars could not be stopped by the use of the brakes, and the defendant was seriously

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injured in trying to save himself by getting off the car. He was on the car as a free passenger, and when he entered the car he passed through it and stood with the driver, without any objection from him, on the front platform. When the horses commenced running, the driver jumped off to stop them, and the plaintiff took the reins and endeavored to stop the car by using the brake, but to no purpose.

Instructions were asked and given in behalf of both parties on the question of negligence and defect in the car, and contributive negligence of plaintiff. These instructions, to my mind, presented the case fairly to the jury.

The only material question is whether, as a matter of law, the fact that the plaintiff voluntarily put himself on the front platform, when there was room inside the car, absolved the defendant from liability. This question is presented by the refused instructions asked by the defendant. The question of negligence is for a jury to decide from the facts and circumstances detailed in evidence. Whether the front platform was a more dangerous place than inside the car, is not a question of law, but of fact for a jury. If it be conceded that the front platform was more dangerous, yet the plaintiff was there without any objection by the defendant or its agents. The defendant had the right to carry passengers on the platform, and passengers might stand there by the consent of defendant's agent. In this case there was no objection at all by defendant's agent to the plaintiff standing on the platform.

In the case of *McKeon v. Citizens' R. Co.*, 42 Mo. 79, a special act of the legislature entitled "An act concerning street railroads in the city of St. Louis," approved January 16, 1860, was set up as a defense in the answer and relied on as exempting the railroad company from liability. This act provided that "said railroad companies shall not be liable for injuries

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occasioned by the getting off or on the cars at the front or forward end of the car." Under this act, if the party complaining received the injury by getting on or off at the front end, then, as a matter of law, he was prevented from recovering. This railway company is not one of the street railroads referred to in that act, and is not protected by its provisions. The defendant does not plead exemption by virtue of this act or any other act of the legislature, but looks to the common law as affording the same protection, and asks the court to declare, as a matter of law, that contributive negligence on the part of the plaintiff is to be presumed from his getting off at the front end of the car. This is not the law as applicable to this case.

Others concurred.

Judgment affirmed.

THOMPSON v. THE NORTH MISSOURI RAILROAD COMPANY.

51 *Missouri*, 190.

Supreme Court of Missouri; January Term, 1873.

Carriers. Injury to passenger. Contributive negligence. In an action to recover from a railway company damages for a personal injury, the plaintiff need not allege and affirmatively establish that he was free from negligence contributing to the injury. Negligence on the part of the plaintiff is a mere defense, to be set up by the defendant and shown like any other defense; and the plaintiff should not be compelled to aver and prove negatives in such cases.

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Appeal to the supreme court of Missouri from the circuit court of Randolph county.

This was an action to recover damages for a personal injury received by the plaintiff in alighting from the defendant's cars. The question presented is stated in the opinion. A demurrer to the petition was sustained, and judgment for the defendant rendered thereupon. From this judgment the plaintiff appealed.

R. T. Prewitt, for the appellant.

J. N. Litton, for the respondent.

WAGNER, J.—In substance, plaintiff alleged in his petition that he was a passenger on the defendant's road, and that in getting off the cars, through the carelessness and negligence of the defendant and its agents, he was injured, for which he asks damages. The circuit court sustained a demurrer to the petition, because there was no averment that the plaintiff at the time was exercising due care and was himself without negligence contributing to the injury. The sole question is whether it was necessary to make this allegation, or whether it was matter which properly devolved on the defendant to set up in the answer, and rely upon in defense.

The question as to burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment, that he exercised proper care and was free from negligence, is new in this court, and is involved in uncertainty by the conflicting and evasive decisions of the courts of other states. While some courts hold that he must allege and affirmatively establish that he was free from culpable negligence contributing to the injury, others hold that his negligence is matter of defense, of which, the burden of pleading and proving rests upon the defendant.

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In my view the latter is the correct doctrine. Negligence on the part of the plaintiff is a mere defense, to be set up in the answer and shown like any other defense; though of course it must be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care. It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury, to be determined upon the evidence, and not a matter of pleading. I can not see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*. Yet it would be difficult to find a case in which it has been held that the plaintiff in such actions must assume the burden of showing himself free from fault. *Shearm. & Redf. on Negligence*, 47.

The petition, I think, stated facts sufficient to require the plaintiff to answer. The judgment should therefore be reversed, and the cause remanded.

All concurred.

Judgment reversed.

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THE NEW YORK CENTRAL RAILROAD COMPANY v. LOCKWOOD.

17 Wallace.

Supreme Court of the United States; October Term, 1873.

Carriers. Contract limiting liability for injury to passenger. A railroad company carrying passengers for hire can not lawfully stipulate for exemption from responsibility for the negligence of itself or servants in respect to such carriage. This rule applies both to common carriers of goods and common carriers of passengers, but with especial force to the latter.

A railroad company does not, by entering into a special contract with a party for carrying his goods or person, drop its character as common carrier, and become an ordinary bailee for hire.

Carefulness and fidelity are *essential* duties of the employment of a common carrier; and they are as essential to the public security in his servants as in himself.

A drover, traveling on a stock train to look after his cattle, upon a pass entitling him to travel free, his passage being one of the terms of the contract for carrying his cattle, is a passenger for hire; and the railway company is liable to him for any injuries to his person caused by the negligence of itself or its servants, although he has agreed to take all risk of such injuries, and although his pass declares that the acceptance of it will be considered a waiver of all claims for damages or injuries received on the train.

Error from the supreme court of the United States to the circuit court for the southern district of New York.

This was an action to recover damages for a personal injury to the plaintiff while traveling on the defendant's train. The facts in the case and the questions presented are stated in the opinion. The jury

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found a verdict for the plaintiff, upon which judgment was entered. To review the judgment the defendant prosecuted a writ of error.

BRADLEY, J.—The plaintiff in this case was a drover, injured while traveling on a stock train of the defendant, proceeding from Buffalo to Albany, and the suit was brought to recover damages for the injury. He had cattle in the train, and had been required, at Buffalo, to sign an agreement to attend to the loading, transporting, and unloading of his cattle, and to take all risk of injury to them, and of personal injury to himself, or whoever went with the cattle; and received what is called a drover's pass, certifying that he had shipped sufficient stock to pass free to Albany, but declaring that the acceptance of the pass was to be considered a waiver of all claims for damages or injuries received on the train. The agreement stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates. It was shown on the trial that these rates were about three times the ordinary rates charged, and that no drover had cattle carried on those terms; but all signed similar agreements to that which was signed by the plaintiff, and received similar passes. Evidence was given on the trial tending to show that the injury complained of was sustained in consequence of negligence on the part of the defendants or their servants, but they insisted that they were exempted by the terms of the contract from responsibility for all accidents, including those occurring from negligence, at least the ordinary negligence of their servants, and requested the judge so to charge. This he refused, and charged that if the jury were satisfied that the injury occurred without any negligence on the part of the plaintiff, and that the negligence of the defendant caused the injury, they must find for the plaintiff, which they did.

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It is unnecessary to notice the subordinate points made, as we are of opinion that all the questions of fact were fairly left to the jury, and that the whole controversy depended on this main question of law.

It may be assumed *in limine*, that the case was one of carriage for hire; for though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

As the duties and responsibilities of public carriers were prescribed by public policy, it has been seriously doubted whether the courts did wisely in allowing that policy to be departed from without legislative interference, by which needed modifications could have been introduced into the law. But the great hardship on the carrier in certain special cases, where goods of great value or subject to extra risk were delivered to him without notice of their character, and where losses happened by sheer accident, without any possibility of fraud or collusion on his part, such as by collisions at sea, accidental fire, &c., led to a relaxation of the rule to the extent of authorizing certain exemptions from liability in such cases to be provided for, either by public notice brought home to the owners of the goods, or by inserting exemptions from liability in the bill of lading, or other contract of carriage. A modification of the strict rule of responsibility, exempting the carrier from liability for accidental losses, where it can be safely done, enables the carrying interest to reduce its rates of compensation, thus proportionally relieving the transportation of produce and merchandise from some of the burdens with which it is loaded.

The question is, whether such modification of re-

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sponsibility by notice or special contract may not be carried beyond legitimate bounds, and introduce evils against which it was the direct policy of the law to guard; whether, for example, a modification which gives license and immunity to negligence and carelessness on the part of a public carrier or his servants, is not so evidently repugnant to that policy as to be altogether null and void; or, at least null and void under certain circumstances.

In the case of sea-going vessels, congress has, by the act of 1851, relieved ship-owners from all responsibility for loss by fire, unless caused by their own design or neglect; and from responsibility for loss of money and other valuables named, unless notified of their character and value; and has limited their liability to the value of ship and freight, where losses happened by the embezzlement or other act of the master, crew, or passengers; or by collision, or any cause occurring without their privity or knowledge; but the master and crew themselves are held responsible to the parties injured by their negligence or misconduct. Similar enactments have been made by state legislatures. This seems to be the only important modification of previously existing law on the subject, which in this country has been effected by legislative interference. And by this it is seen that though intended for the relief of the ship-owner, it still leaves him liable to the extent of his ship and freight for the negligence and misconduct of his employes, and liable without limit for his own negligence.

It is true that the first section of the above act relating to loss by fire has a proviso, that nothing in the act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners. This proviso, however, neither enacts nor affirms anything. It simply expresses the

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intent of congress to leave the right of contracting as it stood before the act.

The courts of New York, where this case arose, for a long time resisted the attempts of common carriers to limit their common-law liability, except for the purpose of procuring a disclosure of the character and value of articles liable to extra hazard and risk. This they were allowed to enforce by means of a notice of non-liability, if the disclosure was not made. But such announcements as "all baggage at the risk of the owner," and such exceptions in bills of lading as "this company will not be responsible for injuries by fire, nor for goods lost, stolen, or damaged," were held to be unavailing and void, as being against the policy of the law. *Cole v. Goodwin*, 19 *Wend. (N. Y.)* 257; *Gould v. Hill*, 2 *Hill (N. Y.)* 623.

But since the decision in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, by this court, in January term, 1848, 6 *How.* 344, it has been uniformly held, as well in the courts of New York as in the federal courts, that a common carrier may, by special contract, limit his common-law liability; although considerable diversity of opinion has existed as to the extent to which such limitation is admissible.

The case of the *New Jersey Steam Nav. Co. v. Merchants' Bank*, above adverted to, grew out of the burning of the steamer *Lexington*. Certain money belonging to the bank had been intrusted to Harnden's Express, to be carried to Boston, and was on board the steamer when she was destroyed. By agreement between the steamboat company and Harnden, the crate of the latter and its contents were to be at his sole risk. The court held this agreement valid, so far as to exonerate the steamboat company from the responsibility imposed by law; but not to excuse them for misconduct or negligence, which the court said it would not presume that the parties intended to include, although

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the terms of the contract were broad enough for that purpose ; and that inasmuch as the company had undertaken to carry the goods from one place to another, they were deemed to have incurred the same degree of responsibility as that which attaches to a private person engaged casually in the like occupation, and were, therefore, bound to use ordinary care in the custody of the goods, and in their delivery, and to provide proper vehicles and means of conveyance for their transportation ; and as the court was of opinion that the steamboat company had been guilty of negligence in these particulars, as well as in the management of the steamer during the fire, they held them responsible for the loss.

As this has been regarded as a leading case, we may pause for a moment to observe that the case before us seems almost precisely within the category of that decision. In that case, as in this, the contract was general, exempting the carrier from every risk and imposing it all upon the party ; but the court would not presume that the parties intended to include the negligence of the carrier or his agents in that exception.

It is strenuously insisted, however, that as negligence is the only ground of liability in the carriage of passengers, and as the contract is absolute in its terms, it must be construed to embrace negligence as well as accident, the former in reference to passengers, and both in reference to the cattle carried in the train. As this argument seems plausible, and the exclusion of a liability embraced in the terms of exemption on the ground that it could not have been in the mind of the parties is somewhat arbitrary, we will proceed to examine the question before propounded, namely, whether common carriers may excuse themselves from liability for negligence. In doing so we shall first briefly review the course of decisions in New York, on which great stress has been laid, and which are claimed to be decisive of the question. Whilst we can not concede this, it is,

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nevertheless, due to the courts of that State to examine carefully the grounds of their decision and to give them the weight that they justly deserve. We think that it will be found, however, that the weight of opinion, even in New York, is not altogether on the side that favors the right of the carrier to stipulate for exemption from the consequences of his own or his servants' negligence.

The first recorded case that arose in New York after the before-mentioned decision in this court, involving the right of a carrier to limit his liability, was that of *Dorr v. New Jersey Steam Nav. Co.*, 4 *Sandf.* (N. Y.) 136, decided in 1850. This case also arose out of the burning of the *Lexington*, under a bill of lading which excepted from the company's risk "danger of fire, water, breakage, leakage, and other accidents." Judge CAMPBELL, delivering the opinion of the court, says: "A common carrier has in truth two distinct liabilities; the one for losses by accident or mistake, where he is liable as an insurer, the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem reasonable that he might, by express special contract, restrict his liability as insurer; that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty. Such we understand to be the doctrine laid down in the case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, in 6 *Howard*, and such we consider to be the law in the present case." And in *Stoddard v. Long Island R. Co.*, 5 *Sandf.* (N. Y.) 180, another express case, in which it was stipulated that the express company should be alone responsible for all losses, Judge DUEB, for the court, says: "Conforming our decision to that of the supreme court of the United States, we must, therefore, hold: 1. That the liability

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of the defendants as common carriers was restricted by the terms of the special agreement between them and Adams & Co., and that this restriction was valid in law. 2. That by the just interpretation of this agreement the defendants were not to be exonerated from all losses, but remained liable for such as might result from the wrongful acts, or the want of due care and diligence of themselves, or their agents and servants. 3. That the plaintiffs, claiming through Adams & Co., are bound by the special agreement." The same view was taken in subsequent cases. *Parsons v. Monteath*, 13 *Barb. (N. Y.)* 353; *Moore v. Evans*, 14 *Id.* 524. All of which show that no idea was then entertained of sanctioning exemptions of liability for negligence.

It was not till 1858, in the case of *Wells v. New York Central R. R. Co.*, 26 *Barb. (N. Y.)* 635, that the supreme court was brought to assent to the proposition that a common carrier may stipulate against responsibility for the negligence of his servants. That was the case of a gratuitous passenger traveling on a free ticket, which exempted the company from liability. In 1862, the court of appeals, by a majority, affirmed this judgment, 42 *N. Y.* 181; and in answer to the suggestion that public policy required that railroad companies should not be exonerated from the duty of carefulness in performing their important and hazardous duties, the court held that the case of free passengers could not seriously affect the incentives to carefulness, because there were very few such, compared with the great mass of the traveling public. *Perkins v. New York Central R. R. Co.*, 24 *N. Y.* 196, was also the case of a free passenger, with a similar ticket, and the court held that the indorsement exempted the company from all kinds of negligence of its agents, gross as well as ordinary; that there is, in truth, no practical distinction in the degrees of negligence.

The next cases of importance that arose in the New

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York courts were those of *drovers' passes*, in which the passenger took all responsibility of injury to himself and stock. The first was that of *Smith v. New York Central R. R. Co.*, 29 *Barb. (N. Y.)* 132, decided in March, 1859. The contract was precisely the same as that in the present case. The damage arose from a flattened wheel in the car, which caused it to jump the track. The supreme court, by HOGEBOM, J., held that the railroad company was liable for any injury happening to the passenger, not only by the gross negligence of the company's servants, but by ordinary negligence on their part. "For my part," says the judge, "I think not only gross negligence is not protected by the terms of the contract, but what is termed ordinary negligence, or the withholding of ordinary care, is not so protected. I think, notwithstanding the contract, the carrier is responsible for what, independent of any peculiar responsibility attached to his calling or employment, would be regarded as fault or misconduct on his part." . . . The judge added, that he thought the carrier might, by positive stipulation, relieve himself to a limited degree from the consequences of his own negligence, or that of his servants. But, to accomplish that object, the contract must be clear and specific in its terms, and plainly covering such a case. Of course, this remark was extra-judicial. The judgment itself was affirmed by the court of appeals, in 1862, by a vote of five judges to three. 24 *N. Y.* 222. Judge WRIGHT strenuously contended that it is against public policy for a carrier of passengers, where human life is at stake, to stipulate for immunity for any want of care. "Contracts in restraint of trade are void," he says, "because they interfere with the welfare and convenience of the state; yet the state has a deep interest in protecting the lives of its citizens." He argued that it was a question affecting the public, and not alone the party who is carried. Judge

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SUTHERLAND agreed in substance with Judge WRIGHT. Two other judges held, that if the party injured had been a gratuitous passenger the company would have been discharged; but in their view he was not a gratuitous passenger. One judge was for affirmance, on the ground that the negligence was that of the company itself. The remaining three judges held the contract valid to the utmost extent of exonerating the company, notwithstanding the grossest neglect on the part of its servants.

In that case, as in the one before us, the contract was general in its terms, and did not specify negligence of agents as a risk assumed by the passenger, though by its generality it included all risks.

The next case, *Bissell v. New York Central R. R. Co.*, 29 Barb. 602, first decided in September, 1859, differed from the preceding in that the ticket expressly stipulated that the railroad company should not be liable under any circumstances, "*whether of negligence by their agents, or otherwise,*" for injury to the person or stock of the passenger. The latter was killed by the express train running into the stock train, and the jury found that his death was caused by the gross negligence of the agents and servants of the defendant. The supreme court held that gross negligence (whether of servants or principals) can not be excused by contract in reference to the carriage of passengers for hire, and that such a contract is against the policy of the law, and void. In December, 1862, this judgment was reversed by the court of appeals, four judges against three, 22 N. Y. 442. Judge SMITH, who concurred in the judgment below, having in the meantime changed his views as to the materiality of the fact that the negligence stipulated against was that of the servants of the company, and not of the company itself. The majority now held that the ticket was a free ticket, as it purported to be, and, therefore, that the case was governed

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by *Wells v. Central R. R. Co.* ; but whether so, or not, the contract was founded on a valid consideration and the passenger was bound by it even to the assumption of the risk arising from the gross negligence of the company's servants. Elaborate opinions were read by Justice SELDEN in favor, and by Justice DENIO against the conclusions reached by the court. The former considered that no rule of public policy forbids such contracts, because the public is amply protected by the right of every one to decline any special contract, on paying the regular fare prescribed by law, that is, the highest amount which the law allows the company to charge. In other words, unless a man chooses to pay the highest amount which the company by its charter is authorized to charge, he must submit to their terms, however onerous. Justice DENIO, with much force of argument, combated this view, and insisted upon the impolicy and immorality of contracts stipulating immunity for negligence, either of servants or principals, where the lives and safety of passengers are concerned. The late case of *Poucher v. New York Central R. R. Co.*, 49 *N. Y.* 263; *post*, 525, is in all essential respects a similar case to this, and a similar result was reached.

These are the authorities which we are asked to follow. Cases may also be found in some of the other state courts which, by dicta or decision, either favor or follow, more or less closely, the decisions in New York. A reference to the principal of these is all that is necessary here. *Ashmore v. Pennsylvania R. R. Co.*, 28 *N. J. L.* (4 *Dutch.*) 180; *Kinney v. Central R. Co.*, 23 *N. J. L.* 407; *Hale v. New Jersey Steam Nav. Co.*, 15 *Conn.* 539; *Peck v. Weeks*, 34 *Id.* 145; *Lawrence v. New York R. Co.*, 35 *Id.* 63; *Kimball v. Rutland R. Co.*, 26 *Vt.* 247; *Mann v. Birchard*, 40 *Vt.* 332; *Adams Exp. Co. v. Haines*, 42 *Ill.* 89; *Id.* 458; *Illinois Central R. R. Co. v. Adams Exp. Co.*, *Id.* 474; *Hawkins v. Great Western R. Co.*, 17 *Mich.* 57; *S. C.*, 18

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Id. 427; Baltimore, &c. R. R. Co. v. Brady, 32 *Md.* 333; 25 *Id.* 128; Laverny v. Union Transp. Co., 42 *Mo.* 270.

A review of the cases decided by the courts of New York shows that though they have carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence, yet that this effect has never been given to a contract general in its terms. So that if we only felt bound by those precedents, we could, perhaps, find no authority for reversing the judgment in this case. But on a question of general commercial law, the federal courts, administering justice in New York, have equal and co-ordinate jurisdiction with the courts of that state. And in deciding a case which involves a question of such importance to the whole country; a question on which the courts of New York have expressed such diverse views, and have so recently and with such slight preponderance of judicial suffrage, come to the conclusion that they have, we should not feel satisfied without being able to place our decision upon grounds satisfactory to ourselves, and resting upon what we consider sound principles of law.

In passing however, it is apposite to call attention to the testimony of an authoritative witness as to the operation and effect of the recent decisions referred to. "The fruits of this rule," says Judge DAVIS, "are already being gathered in increasing accidents, through the decreasing care and vigilance on the part of these corporations; and they will continue to be reaped until a just sense of public policy shall lead to legislative restriction upon the power to make this kind of contracts." *Stinson v. New York Central R. R. Co.*, 32 *N. Y.* 337.

We now proceed to notice some cases decided in other states, in which a different view of the subject is taken.

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In Pennsylvania it is settled by a long course of decisions that a common carrier can not, by notice or special contract, limit his liability so as to exonerate him from responsibility for his own negligence or misfeasance, or that of his servants and agents. *Laing v. Colder*, 8 *Barr (Pa.)* 479; *Camden, &c. R. R. Co. v. Baldauf*, 16 *Pa.* 67; *Goldey v. Pennsylvania R. R. Co.*, 30 *Id.* 342; *Powell v. Pennsylvania R. R. Co.*, 32 *Id.* 414; *Pennsylvania R. R. Co. v. Henderson*, 51 *Id.* 315; *Farnham v. Camden, &c. R. R. Co.*, 55 *Id.* 53; *Express Co. v. Sands*, *Id.* 140; *Empire Transp. Co. v. Wamsutta Oil Co.*, 63 *Id.* 14. "The doctrine is firmly settled," says Chief Justice THOMPSON, in *Farnham v. Camden, &c. R. R. Co.*, "that a common carrier can not limit his liability so as to cover his own or his servants' negligence." 55 *Pa.* 62. This liability is affirmed both when the exemption stipulated for is general, covering all risks, and where it specifically includes damages arising from the negligence of the carrier or his servants. In *Pennsylvania R. R. Co. v. Henderson*, a drover's pass stipulated for immunity of the company in case of injury from negligence of its agents, or otherwise. The court, Judge READ delivering the opinion, after a careful review of the Pennsylvania decisions, says: "This indorsement relieves the company from all liability for any cause whatever, for any loss or injury to the person or property, however it may be occasioned; and our doctrine, settled by the above decisions, made upon grave deliberation, declares that such a release is no excuse for negligence."

The Ohio cases are very decided on this subject, and reject all attempts of the carrier to excuse his own negligence, or that of his servants. *Jones v. Voorhees*, 10 *Ohio*, 145; *Davidson v. Graham*, 2 *Ohio St.* 131; *Graham v. Davis*, 4 *Id.* 362; *Wilson v. Hamilton*, *Id.* 722; *Welsh v. Pittsburg, &c. R. Co.*, 10 *Id.* 75; *Cleveland R. R. v. Curran*, 19 *Id.* 1; *Cincinnati, &c. R. R. Co.*

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v. Pontius, *Id.* 221; Knowlton v. Erie R. Co, *Id.* 260. In Davidson v. Graham, the court, after conceding the right of the carrier to make special contracts to a certain extent, says: "He can not, however, protect himself from losses occasioned by his own fault. He exercises a public employment, and diligence and good faith in the discharge of his duties are essential to the public interests. . . . And public policy forbids that he should be relieved, by special agreement, from that degree of diligence and fidelity which the law has exacted in the discharge of his duties." In Welsh v. Pittsburg, &c. R. Co., the court says: "In this state, at least, railroad companies are rapidly becoming almost the exclusive carriers of both passengers and goods. In consequence of the public character and agency which they have voluntarily assumed, the most important powers and privileges have been granted to them by the state." From these facts the court reasons that it is specially important that railroad companies should be held to the exercise of due diligence at least. And as to the distinction taken by some, that negligence of servants may be stipulated for, the court pertinently says: "This doctrine, when applied to a corporation, which can only act through its agents and servants, would secure complete immunity for the neglect of every duty." pp. 75, 76. And in relation to a drover's pass, substantially the same as that in the present case, the same court, in Cleveland, &c. R. R. Co. v. Curran, 19 *Ohio St.* 1, held, 1. That the holder was not a gratuitous passenger; 2. That the contract constituted no defense against the negligence of the company's servants, being against the policy of the law, and void. The court refers to the cases of Bissell v. New York Central R. R. Co., 25 *N. Y.* 442, and of Pennsylvania R. R. Co. v. Henderson, 51 *Pa. St.* 315, and expresses its concurrence in the Pennsylvania decision. pp. 12, 13. This was in December term, 1869.

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The Pennsylvania and Ohio decisions differ mainly in this, that the former give to a special contract (when the same is admissible) the effect of converting the common carrier into a special bailee for hire, whose duties are governed by his contract, and against whom, if negligence is charged, it must be proved by the party injured, whilst the latter hold that the character of the carrier is not changed by the contract, but that he is a common carrier still, with enlarged exemptions from responsibility, within which the burden of proof is on him to show that an injury occurs. The effect of this difference is to shift the burden of proof from one party to the other. It is unnecessary to adjudicate that point in this case, as the judge on the trial charged the jury, as requested by the defendant, that the burden of proof was on the plaintiff.

In Maine, whilst it is held that a common carrier may, by special contract, be exempted from responsibility for loss occasioned by natural causes, such as the weather, fire, heat, frost, &c. (*Fillbrown v. Grand Trunk R. Co.*, 55 *Me.* 462), yet in a case where it was stipulated that a railroad company should be exonerated from all damages that might happen to any horses or cattle that might be sent over the road, and that the owners should take the risk of all such damages, the court held that the company were not thereby excused from the consequences of their negligence, and that the distinction between negligence and gross negligence in such a case is not tenable. "The very great danger," says the court, "to be anticipated by permitting them" [common carriers] "to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be overestimated. It would remove the principal safeguard for the preservation of life and property in such conveyances." *Sager v. Portsmouth*, 31 *Me.* 228, 238.

To the same purport it was held in Massachusetts

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in the late case of *School District v. Boston, &c. R. R. Co.*, 102 *Mass.* 552, where the defendant set up a special contract that certain iron castings were taken at the owner's risk of fracture or injury during the course of transportation, loading and unloading, and the court say: "The special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence." p. 556.

To the same purport, likewise, are many other decisions of the state courts, as may be seen by referring to the cases cited, some of which were argued with great force, and are worthy of attentive perusal, but, for want of room, can only be referred to here. *Indianapolis, &c. R. R. Co. v. Allen*, 31 *Ind.* 394; *Michigan Southern R. R. Co. v. Heaton*, *Id.* 397, note; *Flinn v. Philadelphia, &c. R. R. Co.*, 1 *Houst. (Del.)* 472; *Orndorff v. Adams Exp. Co.*, 3 *Bush (Ky.)* 194; *Swindler v. Hilliard*, 2 *Rich. (S. C.)* 286; *Berry v. Cooper*, 28 *Ga.* 543; *Steele v. Townsend*, 37 *Ala.* 247; *Southern Exp. Co. v. Crook*, 44 *Id.* 468; *Whitesides v. Thurlkill*, 12 *Smedes & M. (Miss.)* 589; *Southern Exp. Co. v. Moon*, 39 *Id.* 822; *New Orleans, &c. Ins. Co. v. Railroad Co.*, 29 *La. Ann.* 302.

These views as to the impolicy of allowing stipulations against liability for negligence and misconduct are in accordance with the early English authorities. St. Germain, in *The Doctor and Student*, Dial. 2, ch. 38, pointedly says of the common carrier: "If he would per case refuse to carry it" [articles delivered for carriage] "unless promise were made unto him that he shall not be charged for no misdemeanor that should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like."

A century later this passage is quoted by Attorney General Noy in his book of *Maxims* as unquestioned

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law. *Noy's Max.* 92. And so the law undoubtedly stood in England until comparatively a very recent period. Sergeant Steven, in his *Commentaries*, vol. 2, p. 135, after stating that a common carrier's liability might, at common law, be varied by contract, adds that the law still held him responsible for negligence and misconduct.

The question arose in England principally upon public notices given by common carriers that they would not be responsible for valuable goods unless entered and paid for according to value. The courts held that this was a reasonable condition, and, if brought home to the owner, amounted to a special contract valid in law. But it was also held that it could not exonerate the carrier if a loss occurred by his actual misfeasance or gross negligence. Or, as Starkie says, "proof of a direct misfeasance or gross negligence is in effect an answer to proof of notice." 2 *Starkie on Evid.* 6th Am. ed. 205. But the term "gross negligence" was so vague and uncertain that it came to represent every instance of actual negligence of the carrier or his servant—or ordinary negligence in the accustomed mode of speaking. *Hinton v. Dibbon*, 2 *Adolph. & E. N. S.* 649; *Wild v. Pickford*, 8 *Mees. & W.* 460. Justice STORY, in his work on bailments, originally published in 1832, says that it is now held that, in cases of such notices, the carrier is liable for losses and injury occasioned not only by gross negligence, but by ordinary negligence, or, in other words, the carrier is bound to ordinary diligence. *Story on Bailments*, § 571.

In estimating the effect of these decisions it must be remembered that, in the cases covered by the notices referred to, the exemption claimed was entire, covering all cases of loss, negligence as well as others. They are, therefore, directly in point.

In 1863, in the great case of *Peek v. North Stafford-*

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shire R. Co., 10 *House of Lords Cas.* 473, Mr. Justice BLACKBURN, in the course of a very clear and able review of the law on the subject, after quoting this passage from Justice STORY's work, proceeds to say: "In my opinion, the weight of authority was, in 1832, in favor of this view of the law, but the cases decided in our courts, between 1832 and 1854, established that this was not the law, and that a carrier might, by a special notice, make a contract limiting his responsibility even in the cases here mentioned, of gross negligence, misconduct, or fraud on the part of his servants, and, as it seems to me, the reason why the legislature intervened in the railway and canal traffic act, 1854, was because it thought that the companies took advantage of those decisions (in STORY's language), 'to evade altogether the salutary policy of the common law.' "

This quotation is sufficient to show the state of the law in England at the time of the publication of Judge STORY's work; and it proves that, at that time, common carriers could not stipulate for immunity for their own or their servants' negligence. But in the case of *Carr v. Lancashire R. Co.*, 7 *Exch.* 707, and other cases, decided whilst the change of opinion, alluded to by Justice BLACKBURN, was going on (several of which related to the carriage of horses and cattle), it was held that carriers could stipulate for exemption from liability for even their own gross negligence. Hence the act of 1854 was passed, called the railway and canal traffic act, declaring that railway and canal companies should be liable for negligence of themselves, or their servants, notwithstanding any notice or condition, unless the court or judge trying the cause should adjudge the conditions just and reasonable. 1 *Fish. Dig.* 1466. Upon this statute ensued a long list of cases deciding what conditions were or were not just and reasonable. The truth is, that this statute did little more than bring back the law to the original

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position in which it stood before the English courts took their departure from it. But as we shall have occasion to advert to this subject again, we pass it for the present.

It remains to see what has been held by this court on the subject now under consideration.

We have already referred to the leading case of *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 *How.* 383. On the precise point now under consideration, Justice NELSON said: "If it is competent at all for the carrier to stipulate for the gross negligence of himself, and his servants or agents, in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties."

As to the carriers of passengers, Mr. Justice GRIER, in the case of *Philadelphia, &c. R. R. Co. v. Derby*, 14 *How.*, 486, delivering the opinion of the court, said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such a transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of 'gross.'" That was the case of a free passenger, a stockholder of the company, taken over the road by the president to examine its condition; and it was contended in argument that as to him nothing but "gross negligence" would make the company liable. In the subsequent case of *The New World v. King*, 16 *How.* 469, which was also the case of a free passenger carried on a steamboat, and injured by the explosion of the boiler, CURTIS, Justice, delivering the judgment, quoted the above proposition of Justice GRIER, and said: "We desire

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to be understood to reaffirm that doctrine, as resting not only on public policy, but on sound principles of law." p. 474.

In *York Company v. Central R. R.*, 3 *Wall.* 113. the court, after conceding that the responsibility imposed on the carrier of goods by the common law may be restricted and qualified by express stipulation, adds: "When such stipulation is made, and it does not cover losses from negligence or misconduct, we can perceive no just reason for refusing its recognition and enforcement." In the case of *Walker v. Transportation Co.*, 3 *Wall.* 150, decided at the same term, it is true, the owner of a vessel destroyed by fire on the lakes was held not to be responsible for the negligence of the officers and agents having charge of the vessel; but that was under the act of 1851, which the court held to apply to our great lakes as well as to the sea. And in *Express Co. v. Kountze Brothers*, 8 *Wall.* 342, where the carriers were sued for the loss of gold-dust delivered to them on a bill of lading excluding liability for any loss or damage by fire, act of God, enemies of the government, or dangers incidental to a time of war, they were held liable for a robbery by a predatory band of armed men (one of the excepted risks), because they negligently and needlessly took a route which was exposed to such incursions. The judge at the trial charged the jury that, although the contract was legally sufficient to restrict the liability of the defendants as common carriers, yet if they were guilty of actual negligence they were responsible, and that they were chargeable with negligence unless they exercised the care and prudence of a prudent man in his own affairs. This was held by this court to be a correct statement of the law. p. 353.

Some of the above citations are only expressions of opinion, it is true, but they are expressions of judges whose opinions are entitled to much weight; and the

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last cited case is a judgment upon the precise point. Taken in connection with the concurring decisions of state courts before cited, they seem to us decisive of the question, and leave but little to be added to the considerations which they suggest.

It is argued that a common carrier, by entering into a special contract with a party for carrying his goods or person on modified terms, drops his character, and becomes an ordinary bailee for hire, and, therefore, may make any contract he pleases. That is, he may make any contract whatever, because he is an ordinary bailee, and he is an ordinary bailee because he has made the contract.

We are unable to see the soundness of this reasoning. It seems to us more accurate to say that common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Those responsibilities may vary in different countries, and at different times, without changing the character of the employment. The common law subjects the common carrier to insurance of the goods carried, except as against the act of God or public enemies. The civil law excepts also losses by means of *any* superior force, and any inevitable accident. Yet the employment is the same in both cases. And if by special agreement the carrier is exempted from still other responsibilities, it does not follow that his employment is changed, but only that his responsibilities are changed. The theory occasionally announced, that a special contract as to the terms and responsibilities of carriage changes the nature of the employment, is calculated to mislead. The responsibilities of a common carrier may be reduced to those of an ordinary bailee for hire, whilst the nature of his business renders him a common carrier still. Is there any good sense in holding that a railroad company, whose only business is to carry passengers and goods, and which

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was created and established for that purpose alone, is changed to a private carrier for hire by a mere contract with a customer, whereby the latter assumes the risk of inevitable accidents in the carriage of his goods? Suppose the contract relates to a single crate of glass or crockery, whilst at the same time the carrier receives from the same person twenty other parcels, respecting which no such contract is made. Is the company a public carrier as to the twenty parcels, and a private carrier as to the one?

On this point there are several authorities which support our view, some of which are noted. *Davidson v. Graham*, 2 *Ohio St.* 131; *Graham v. Davis & Co.*, 4 *Id.* 362; *Swindler v. Hilliard*, 2 *Rich. (S. C.)* 286; *Baker v. Brinson*, 9 *Id.* 201; *Steel v. Townsend*, 37 *Ala.* 247.

A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special agreement, he undertakes to carry something which it is not his business to carry. For example, if a carrier of produce, running a truck boat between New York city and Norfolk, should be requested to carry a keg of specie, or a load of expensive furniture, which he could justly refuse to take, such agreement might be made in reference to his taking and carrying the same as the parties chose to make, not involving any stipulation contrary to law or public policy. But when a carrier has a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, it is a common carrier, and a special contract about its responsibility does not divest it of the character.

But it is contended that though a carrier may not stipulate for his own negligence, there is no good rea-

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son why he should not be permitted to stipulate for immunity for the negligence of his servants, over whose actions, in his absence, he can exercise no control. If we advert for a moment to the fundamental principles on which the law of common carriers is founded, it will be seen that this objection is inadmissible. In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. In regard to passengers, the highest degree of carefulness and diligence is expressly exacted. In the one case the securing of the most exact diligence and fidelity underlies the law, and is the reason for it; in the other it is directly and absolutely prescribed by the law. It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the *essential duties* of his employment. And to assert that he may do so seems almost a contradiction in terms.

Now, to what avail does the law attach these essential duties to the employment of the common carrier, if they may be waived in respect to his agents and servants, especially where the carrier is an artificial being incapable of acting except by agents and servants? It is carefulness and diligence in performing the service which the law demands, not an abstract carefulness and diligence in proprietors and stockholders who take no active part in the business. To admit such a distinction in the law of common carriers, as the business is now carried on, would be subversive of the very object of the law.

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It is a favorite argument in the cases which favor the extension of the carrier's right to contract for exemption from liability, that men must be permitted to make their own agreements, and that it is no concern of the public on what terms an individual chooses to have his goods carried. Thus, in *Dorr v. New Jersey Steam Nav. Co.*, 11 *N. Y.* 485, the court sums up its judgment thus: "To say the parties have not a right to make their own contract, and to limit the precise extent of their own respective risks and liabilities, in a matter no way affecting the public morals, or conflicting with the public interests, would, in my judgment, be an unwarrantable restriction upon trade and commerce, and a most palpable invasion of personal right."

Is it true that the public interest is not affected by individual contracts of the kind referred to? Is not the whole business community affected by holding such contracts valid? If held valid, the advantageous position of the companies exercising the business of common carriers is such that it places it in their power to change the law of common carriers in effect, by introducing new rules of obligation.

The carrier and his customer do not stand on a footing of equality. The latter is only one individual of a million. He can not afford to higggle or stand out and seek redress in the courts. His business will not admit such a course. He prefers, rather, to accept any bill of lading, or sign any paper the carrier presents; often, indeed, without knowing what the one or the other contains. In most cases, he has no alternative but to do this, or abandon his business. In the present case, for example, the freight agent of the company testified that though they made forty or fifty contracts every week, like that under consideration, and had carried on the business for years, no other arrangement than this was ever made with any drover. And the reason is obvious enough—if they did not accept this, they must pay

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tariff rates. These rates were seventy cents a hundred pounds for carrying from Buffalo to Albany, and each horned animal was rated at two thousand pounds, making a charge of fourteen dollars for every animal carried, instead of the usual charge of seventy dollars for a car load ; being a difference of three to one. Of course no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are ; and how necessary it is to stand firmly by those principles of law by which the public interests are protected.

If the customer had any real freedom of choice, if he had a reasonable and practicable alternative, and if the employment of the carrier were not a public one, charging him with the duty of accommodating the public in the line of his employment ; then, if the customer chose to assume the risk of negligence, it could with more reason be said to be his private affair, and no concern of the public. But the condition of things is entirely different, and especially so under the modified arrangements which the carrying trade has assumed. The business is mostly concentrated in a few powerful corporations, whose position in the body politic enables them to control it. They do in fact control it, and impose such conditions upon travel and transportation as they see fit, which the public is compelled to accept. These circumstances furnish an additional argument, if any were needed, to show that the conditions imposed by common carriers ought not to be adverse (to say the least) to the dictates of public policy and morality. The status and relative position of the parties render any such conditions void. Contracts of common carriers, like those of persons occupying a fiduciary character, giving them a position in which they can take undue advantage of the persons with whom they contract, must rest upon their fairness

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and reasonableness. It was for the reason that the limitations of liability first introduced by common carriers into their notices and bills of lading were just and reasonable, that the courts sustained them. It was just and reasonable that they should not be responsible for losses happening by sheer accident, or dangers of navigation that no human skill or vigilance could guard against; it was just and reasonable that they should not be chargeable for money or other valuable articles liable to be stolen or damaged, unless apprised of their character or value; it was just and reasonable that they should not be responsible for articles liable to rapid decay, or for live animals liable to get unruly from fright, and to injure themselves in that state, when such articles or live animals became injured without their fault or negligence. And when any of these just and reasonable excuses were incorporated into notices or special contracts assented to by their customers, the law might well give effect to them without the violation of any important principle, although modifying the strict rules of responsibility imposed by the common law. The improved state of society and the better administration of the laws had diminished the opportunities of collusion and bad faith on the part of the carrier, and rendered less imperative the application of the iron rule, that he must be responsible at all events. Hence the exemptions referred to were deemed reasonable and proper to be allowed. But the proposition to allow a public carrier to abandon altogether his obligations to the public, and stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Hence, as before remarked, we regard the English statute, called the railway and canal traffic act, passed in 1854, which declared void all notices and conditions

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made by common carriers, except such as the judge at the trial or the courts should hold just and reasonable, as substantially a return to the rules of the common law. It would have been more strictly so, perhaps, had the reasonableness of the contract been referred to the law instead of the individual judges. The decisions made for more than half a century before the courts commenced the abnormal course which led to the necessity of that statute, giving effect to certain classes of exemptions stipulated for by the carrier, may be regarded as authorities on the question as to what exemptions are just and reasonable. So the decisions of our own courts are entitled to like effect when not made under the fallacious notion that every special contract imposed by the common carrier on his customers must be carried into effect, for the simple reason that it was entered into without regard to the character of the contract and the relative situation of the parties.

Conceding, therefore, that special contracts, made by common carriers with their customers, limiting their liability, are good and valid, so far as they are just and reasonable; to the extent, for example, of excusing them for all losses happening by accident, without any negligence or fraud on their part; when they ask to go still further, and to be excused for negligence—an excuse so repugnant to the law of their foundation and to the public good—they have no longer any plea of justice or reason to support such a stipulation, but the contrary. And then, the inequality of the parties, the compulsion under which the customer is placed, and the obligations of the carrier to the public, operate with full force to divest the transaction of validity.

On this subject the remarks of Chief Justice REDFIELD, in his recent collection of American railway cases, seem to us eminently just. "It being clearly established, then," says he, "that common carriers

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have public duties which they are bound to discharge with impartiality, we must conclude that they can not, either by notices or special contracts, release themselves from the performance of these public duties, even by the consent of those who employ them ; for all extortion is done by the apparent consent of the victim. A public officer or servant, who has a monopoly in his department, has no just right to impose onerous and unreasonable conditions upon those who are compelled to employ him." And his conclusion is, that notwithstanding some exceptional decisions, the law of to-day stands substantially as follows : "That the exemption claimed by carriers must be reasonable and just, otherwise it will be regarded as extorted from the owners of the goods by duress of circumstances, and, therefore, not binding. 2. That every attempt of carriers, by general notices or special contracts, to excuse themselves from responsibility for losses or damages resulting in any degree from their own want of care and faithfulness, is against that good faith which the law requires as the basis of all contracts or employments, and, therefore, based upon principles and a policy which the law will not uphold."

The defendant endeavors to make a distinction between gross and ordinary negligence, and insists that the judge ought to have charged that the contract was at least effective for excusing the latter.

We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called

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slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence. In each case, the negligence, whatever epithet we give it, is to bestow the care and skill which the situation demands ; and hence it is more strictly accurate perhaps to call it simply "negligence." And this seems to be the tendency of modern authority. 1 *Smith's Lead. Cas.* 6th Am. ed. ; *Story on Bailments*, § 571 ; *Wyld v. Pickford*, 7 *Mees. & W.* 460 ; *Hinton v. Dibbon*, 2 *Q. B.* 661 ; *Wilson v. Brett*, 11 *Mees. & W.* 115 ; *Beal v. South Devon R. Co.*, 3 *Hurlst. & C.* 337 ; *E. R.*, 1 *C. B.* 600 ; 14 *How.* 486 ; 16 *Id.* 474. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far ; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that "every act whatever of man that causes damage to another, obliges him by whose fault it happened to repair it." Art. 1382. TOULLIER, in his commentary on the Code, regards this as a happy thought, and a return to the law of nature. Vol. 6, p. 243. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice.

In the case before us, the law, in the absence of special contract, fixes the degree of care and diligence due from the railroad company to the persons carried on its trains. A failure to exercise such care and diligence is negligence. It needs no epithet properly and legally to describe it. If it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or

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which, in other words, will excuse them for negligence in the performance of that duty, then the company remains liable for such negligence. The question whether the company was guilty of negligence in this case, which caused the injury sustained by the plaintiff, was fairly left to the jury. It was unnecessary to tell them whether, in the language of law writers, such negligence would be called gross or ordinary.

The conclusions to which we have come are :

First. That a common carrier can not lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law.

Secondly. That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants.

Thirdly. That these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter.

Fourthly. That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire.

These conclusions decide the present case, and require a judgment of affirmance. We purposely abstain from expressing any opinion as to what would have been the result of our judgment had we considered the plaintiff a free passenger instead of a passenger for hire.

Judgment affirmed.

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POUCHER v. THE NEW YORK CENTRAL RAIL-
ROAD COMPANY.

49 *New York*, 268.

Court of Appeals of New York; April Term, 1872.

Carriers. Special contract limiting liability. A contract for the transportation of sheep by railroad provided that the owner "should go or send some person or persons in the same train with the stock to take charge of the same, who should be carried free of charge, and who should take all the risks of personal injury from whatever cause, whether of negligence of the railroad company, its agents, or otherwise." He also received a pass which provided that its acceptance should be considered "a waiver of all claims against the company for personal injury received when on the above train." After the sheep were loaded, and the train was about starting, the owner, intending himself to go with the train, while passing the tender, was struck and injured by a stick of wood thrown therefrom by the engineer. In an action by him to recover damages from the railroad company,—*Held*, that under the contract the company was exempt from liability. To bring the plaintiff within the stipulation, it was not necessary that he should have been actually riding on the train at the time of his injury.

Appeal to the court of appeals of New York from the general term of the supreme court in the seventh judicial district.

This was an action to recover damages for injury to the person of the plaintiff, alleged to have been caused by the defendant's negligence.

The plaintiff and defendant had entered into an agreement in writing for the transportation by the defendant for the plaintiff of a car-load of sheep. The

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contract provided that the plaintiff "should go or send some person or persons in the same train with the stock to take charge of the same, who should be carried free of charge, and who should take all the risks of personal injury from whatever cause, whether of negligence of defendant, its agents, or otherwise." The pass received by the plaintiff when the contract was entered into, provided that its acceptance should be considered "a waiver of all claims against the company for personal injury received when on the above train." The plaintiff, intending himself to go with the sheep, loaded them upon defendant's train, and afterwards, in passing the tender to the engine of the train, was struck upon the foot by a large stick of wood thrown from the tender by the engineer, and was seriously injured.

Defendant's counsel moved for a nonsuit upon the ground, among others, that, under the contract, defendant was exempted from liability. The motion was denied, and the jury rendered a verdict for plaintiff. A motion for a new trial was made by the defendant, upon the judge's minutes, which was denied. The defendant appealed to the general term, and obtained a stay of proceedings upon the verdict, pending the appeal. The general term affirmed the order denying a new trial, and directed judgment for the plaintiff upon the verdict. The defendant appealed to the court of appeals.

Samuel Hand, for the appellant.

J. Welling, for the respondent.

RAPALLO, J.—The questions of negligence on the part of the defendant, and of contributing negligence on the part of the plaintiff, were upon the evidence proper for the consideration of the jury, and on these questions their verdict is conclusive.

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But we are of opinion that, under the contract between the plaintiff and the defendant, the latter was exempted from liability for the injury sustained by the plaintiff through the negligence of its servants, and that the motion for a nonsuit on this ground should have been granted. The injury complained of was sustained by the plaintiff while he was on the defendant's premises, moving about the train on which his animals were laden, for the purpose of taking care of them, and engaged in the performance of that duty. His only business there was to take charge of the stock in pursuance of the terms of the contract. The train was about starting, and he was to go in it according to the terms of the contract, being provided with a free pass for that purpose. The contract provided that he should go or send some person on the same train with the stock, to take charge of it, who should be carried free of charge, and that such person so riding free should take all the risk of personal injury from whatever cause, whether of negligence of the defendant, or its agents, or otherwise. We do not think it necessary, to bring the plaintiff within the operation of this stipulation, that he should have been actually riding at the time of his injury. The train had been formed, and was about to start. The plaintiff was there, under the contract, as a passenger, furnished with a pass entitling him to ride free, and coming from the performance of the duties contemplated by his contract. These features did not exist in the case of *Stinson v. New York Central R. R. Co.*, 32 *N. Y.* 333, and the decision in that case comments upon their absence. We think the plaintiff was fairly within the stipulation contained in this contract. *Northrup v. Railroad Passenger Assurance Co.*, 43 *N. Y.* 516.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

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GROVER, FOLGER, and ALLEN, JJ., concurred.

CHURCH, Ch. J., and PECKHAM, J., did not vote.

Judgment reversed.

RAWSON v. THE PENNSYLVANIA RAILROAD COMPANY.

48 *New York*, 212.

Commission of Appeals of New York; January Term, 1872.

Carriers. Baggage. Married women. Wearing apparel and personal ornaments, the paraphernalia of a married woman, given to her by her husband, are, under the statutes of New York in reference to the property of married women, her separate property; and an action against a railway company to recover damages for their loss or destruction, is properly brought in her name.

Carriers. Limiting liability for loss of baggage, by notice on ticket. Matter printed upon the face of a railroad ticket, stating the terms upon which passengers' baggage will be carried by the railway company, is within the rule that a common carrier can not limit his liability by notice, but only by express contract. The ticket does not, generally, contain any contract, and is a mere token or voucher.

Although, if the attention of a passenger is called to such a notice when his ticket is purchased, or if it is shown that he knows of the notice at the time, the law may presume, in the absence of objection, that he assented to its terms, his rights are not affected by his reading such notice after he has purchased his ticket, and entered on his journey.

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Appeal to the commission of appeals of New York from the general term of the supreme court in the first judicial department.

This was an action to recover the value of two trunks, destroyed while being transported by the defendant, as baggage of the plaintiff, a passenger on the defendant's railroad.

The plaintiff was a married woman, and the trunks contained her clothing and jewelry. The greater part of the property had been given to her by her husband; but a large part of it she had received from her son.

The ticket for her passage, which she purchased from the defendant, contained the following notice on its face:

"This ticket entitles the holder to not over 80 lbs. baggage free, and not at rate exceeding in value 100 dollars, unless notice is given, and an extra amount paid, at double first-class freight rates. No road represented by either of these tickets is responsible for the passenger or baggage while upon any other road.

"(Signed) H. R. PAYSON,
"General Passenger Agent."

The trunks were checked as baggage in the usual manner. The plaintiff did not pay any extra amount.

The jury found a verdict for the plaintiff for the full value of the property destroyed; and judgment for the plaintiff was entered on the verdict. From the judgment the defendant appealed to the general term, which affirmed the judgment; and the defendant again appealed.

A. J. Vanderpoel, for the appellant.

D. M. Porter, for the respondent.

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EARL, Com.—The first question to be considered is, whether the property destroyed belonged to the plaintiff in such a sense that she can maintain this action. It consisted of her wearing apparel and personal ornaments, and constituted her paraphernalia. A portion of them was given to her by her husband, and as to such portion it is claimed she had no such property as will sustain a recovery in her name. At common law the wife's paraphernalia during coverture ordinarily belonged to the husband, and he could dispose of them; but he could not dispose of them by will; and if the wife survived him, she could claim them against all persons, except the husband's creditors. And this common-law rule is substantially embodied in our statutes, except that the wife's paraphernalia are secured to her even as against creditors. 2 *Rev. Stat.*, 84, §§ 9, 10; *Williams on Executors*, 644; *Willard's Executors*, 251; *Reeves' Domestic Relations*, 37.

For an injury to or conversion of the wife's paraphernalia during coverture, the husband was, at common law, the proper party to sue, and this rule has not been changed by our statutes, except so far as the wife can, in any case, claim the paraphernalia as her separate property.

This property was given to the wife by her husband and her son. As to so much as was given to her by her son, no question is made; but it is claimed that the gift from her husband to her was invalid, and hence that the property remained his. Prior to the recent legislation in this state in reference to the rights of married women, gifts of personal property from husband to wife would be upheld in equity, though void at common law, and such gifts could be impeached only by creditors. *Graham v. Londonderry*, 3 *Atk.* 393; *Deming v. Williams*, 26 *Conn.* 226; *Borst v. Spelman*, 4 *N. Y.* 284; *Neufville v. Thomson*, 3 *Edw. (N. Y.) Ch.* 92; *Mews v. Mews*, 21 *Eng. L. & Eq.* 556; *Reeves'*

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Dom. Rel. 3d ed. 170, note 1. In equity the property given would be treated as the wife's separate estate, and she would be protected in its enjoyment and possession, even against the interference of her husband. This estate, under the statutes of 1848, 1849, 1860, and 1862, in reference to the property of married women, if not absolutely converted into a legal estate, is clothed with all the incidents of a legal estate, and she is the proper person to sue and to be sued in reference thereto. Hence I can not doubt that this action was properly brought in the name of the plaintiff.

The only other question to be considered is, whether the matter printed upon the face of the railroad ticket, bought by the plaintiff at Massillon, limited the liability of the defendant ; and that it did not, is now too well settled to admit of dispute. *Blossom v. Dodd*, 43 *N. Y.* 264. The words thus printed do not purport to embody the contract between the parties. They are a mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or a separate piece of paper posted up at the ticket office ; and hence this case is clearly within the rule that a carrier can not limit his liability by notice, but can do so only by express contract.

It must, however, be admitted that if the railroad agent had called plaintiff's attention to this language, when he sold the ticket and took her money, or if it had been shown that she knew of this language when she paid her money and took the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed. But here she testified that she did not read this language, and there is no proof that she received the ticket under such circumstances that the law will presume that she must have known and understood the language, and assented to

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the terms. It would be unreasonable to presume that a passenger, when he buys a railroad ticket at a ticket office, stops to read the language printed upon it, and it would be equally unreasonable to hold that a passenger must take notice that the language upon his ticket contains any contract, or in any way limits the carrier's common-law liability.

A ticket does not generally contain any contract, and is not intended to. It is a mere token or voucher adopted for convenience to show that the passenger has paid his fare from one place to another.

The contract between these parties was made when the plaintiff bought her ticket, and the rights and duties of the parties were then determined. Hence, even if the plaintiff had read what appears upon her ticket after she had entered upon her journey, it would have made no difference with her rights. She was not then obliged to submit to a contract which she never made, or leave the train and demand her baggage.

I have, therefore, reached the conclusion that the judgment should be affirmed, with costs.

LEONARD, Com., did not sit.

Others concurred.

Judgment affirmed.

Devitt v. Pacific R. R. Co.

DEVITT v. THE PACIFIC RAILROAD COMPANY.

50 *Missouri*, 802.

Supreme Court of Missouri; July Term, 1872.

Master and servant. Contributive negligence. A brakeman, while at his brake on the defendant's freight car, in passing a bridge was struck by the cross timbers and killed. He had passed the bridge daily, in the same employment, during the two or three previous weeks. He had repeatedly been warned of the danger of injury from this bridge; and just before reaching it, on this occasion, he was seen sitting upon his brake, facing the bridge. *Held*, that, under the circumstances, his own negligence contributed to the injury, and therefore the defendant was not liable for resulting damages.

The deceased having also had knowledge of his exposure to danger in serving as brakeman upon a train having to pass bridges not high enough to permit him to pass under them while standing at full height upon a car, and having with such knowledge continued in the defendant's service until killed by coming in contact with one of such bridges,—*Held*, that the defendant was not liable for the resulting damages on the ground of negligence in the construction of the bridge. In such a case the servant himself assumes the risk, and it can not be charged upon the employer.

Appeal to the supreme court of Missouri from the court of common pleas of Kansas City.

This was an action to recover damages for causing the death of a minor son of the plaintiff. The facts of the case, and the questions arising upon them, are stated in the opinion. The plaintiff recovered judgment; from which the defendant appealed.

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J. N. Litton, for the appellant.

W. E. Sheffield, for the respondent.

BLISS, J.—The plaintiff recovered damages below, under section 3 of the damage act, for the death of her minor son while in defendant's employ. The facts are undisputed. The plaintiff's son was a brakeman on a freight train, and was killed while at his brake, upon the top of a freight car, in passing through Post Oak bridge, the cross timbers on the top of the bridge being so low as to strike his head. The accident occurred in the day time, and it was shown that deceased had been in defendant's employ about three weeks; that he had passed this bridge every day during that time; that he had repeatedly been warned to look out for this and other bridges; that when last seen, just before reaching the bridge, he was sitting upon his brake, facing it. The following instructions, asked by defendant and refused, raised the only legal questions necessary to be considered:

“If the jury believe from the evidence that the deceased, James Devitt, while in the employment of his duty as brakeman, passed over the bridge in question (Post Oak bridge) daily for the space of two or three weeks, and that he knew the danger of coming in contact with the top of said bridge, and that his attention had been called to the danger of injury from the lowness of the bridges on his route, and that with this knowledge he sat upon the top of the brake on the freight car, and while so sitting there was in passing struck by the top thereof and killed, then the jury are instructed that this was contributory negligence on the part of deceased, and that plaintiff can not recover.”

“If the deceased knew of the exposure to danger in serving as brakeman for defendant upon a train having to pass bridges insufficiently high to permit him

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to pass under them while standing at full height on the top of a car ; and with such knowledge consented to and did continue in the service of the defendant as such brakeman, and was thereafter killed by coming in contact with the top of one of said bridges, then the plaintiff can not recover from the defendant from any negligence in the construction of the bridge."

Both these instructions should have been given. Upon the facts supposed in one, the deceased was killed in consequence of his own negligence, which not only contributed to but was the immediate cause of his death ; and upon the hypothesis embraced in the other, the deceased voluntarily encountered the danger, took upon himself the risk of the low bridge, well knowing its height ; and even though it was wrongfully built at that height, and would charge the defendant under other circumstances, the plaintiff can not recover.

1. Upon the facts first supposed, it would almost seem that the deceased committed suicide ; at least, that he was trying the extremely hazardous experiment of sitting upon the brake, which was a high one, and which elevated him higher than he would have been upon his feet, to see whether he could stoop sufficiently to clear the timber. It would be difficult to imagine a clearer case of contributory negligence ; and if one guilty of it could recover, or his friends for him, if the experiment proved fatal, we must necessarily ignore the legal consequences of such negligence. Upon this point counsel claim that the jury had already been properly instructed, and that the instruction refused was superfluous. It is true that the jury had been told that if they believed that said Devitt was killed by reason of the negligence of defendant in building the bridge, "without negligence on his part contributing thereto," they should find for plaintiff. This proviso in regard to contributory negligence was general in its

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terms, and might not be understood by the jury. We all know that jurors, where, as in Missouri, verbal explanation by the court is forbidden, are liable to be deceived as to the law, even when correctly stated. Instructions are apt to assume too much of an abstract character; and if the other party, in order to prevent misconstruction, asks to have the law applied to the facts, as he claims them to be, by an additional appropriate instruction, it should be given. The jury might not know what was contributory negligence, and therefore the defendant had a right to have the matter explained, and to require that they be told that certain facts which the evidence tended to establish constituted such negligence.

2. Upon the other point the law is settled. An employe or servant can not recover for injuries received from the negligence of other servants when the principal is not at fault. But if the principal has been guilty of fault or negligence, either in providing suitable machinery, or in the selection or employment of agents or servants, and injury arise in consequence, he must respond in damages. The liability is, however, modified when the servant himself, well knowing the default of his principal, as in providing defective or unsuitable machinery, voluntarily enters upon the employment. By so doing he assumes the risk, and hence can not charge it to his employer. *Wright v. New York Central R. R. Co.*, 25 *N. Y.* 566; *Buzzell v. Laconia M. Co.*, 43 *Me.* 113; *Thayer v. State Line, &c. R. R. Co.*, 22 *Ind.* 26; *Hayden v. Smithville M. Co.*, 29 *Conn.* 548; *Mad River, &c. R. R. Co. v. Barber*, 5 *Ohio St.* 541. Much of the work of the country is done without the employment of the best machinery, or the most competent men; and it would be disastrous if those prosecuting it were held to insure the safety of all who enter their service. If persons are induced to engage, in ignorance of such neglect, and are injured

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in consequence, they should be entitled to compensation; but if advised of it, they assume its risk. They contract with reference to things as they are known to be; and no contract is violated and no wrong is done if they suffer from a neglect whose risk they assumed. *Volenti non fit injuria.*

All concurred.

Judgment reversed.

WORSTER v. FORTY-SECOND STREET &
GRAND STREET FERRY RAILROAD
COMPANY.

50 New York, 208.

Court of Appeals of New York; November Term, 1872.

Negligence. Defect in Track. A railroad company that lays its tracks in a street or public highway is under obligation to lay them in a proper manner, and to keep them in repair; and if an injury occurs, by reason of a neglect in either of these respects, the company is liable for the resulting damage. *So held*, in an action for injury to a horse that, while being driven by his owner over a street-railroad track, stepped into a hole, was thrown down, and fatally injured.

Notice to the railroad company of a patent defect is not necessary to maintain such an action. An omission to know that such a defect existed, is *prima facie* negligence as much as an omission to repair after notice.

The presumption of negligence is complete when it appears that the defect existed and an injury was caused thereby. If circumstances exist, showing absence of negligence, they must be proved by the railroad company.

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Appeal to the court of appeals of New York from the court of common pleas for the city and county of New York.

This was an action to recover damages for an injury to the plaintiff's horse, resulting in his death, alleged to have been caused by his stepping into a hole in the defendant's track in one of the streets of the city of New York.

The action was brought in the marine court of the city of New York. The special term dismissed the complaint upon the ground that there was no evidence showing that defendant was aware of the bad condition of its track, or that the same was in such condition for a length of time that would imply knowledge; and judgment was entered for the defendant. The plaintiff appealed to the general term, which affirmed the judgment, and he again appealed to the common pleas of the city and county of New York, in which court the judgment was reversed. From this judgment of reversal the defendant appealed to the court of appeals.

Moses Ely, for the appellant.

J. H. Anthon, for the respondent.

CHURCH, Ch. J.—We are to assume that the defendant had a lawful right to lay its tracks in the street, where the injury occurred, but this right carries with it the obligation to lay the tracks in a proper manner and keep them in repair; and if an injury occurs by reason of neglect in either of these respects the defendant is liable in damages. *Fash v. Third avenue R. R. Co.*, 1 *Daly* (N. Y.) 148; 11 *Pa.* 141. The defect was immediately connected with the track, and was plainly visible to the employes of the defendant, who were constantly operating the road. The duty

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of remedying the defect was affirmative and absolute. Notice to the defendants of the defect was not necessary. 35 N. Y. 58. It was their duty to know it. It was patent, and an omission to know that such a defect existed was *prima facie* negligence as much as an omission to repair after notice. The facts tended to prove that the defect had existed for some days. The learned judge who presided nonsuited the plaintiff because the defendant had no notice of the defects, and because they had not existed for such a length of time as to create the presumption of knowledge. The ruling was erroneous. The presumption of knowledge arises from the existence of the defects themselves. The plaintiff was only required to show that the injury resulted from the road being out of repair, and if circumstances existed showing absence of negligence, it was for the defendant to prove them. The presumption of negligence was complete when it appeared that defects existed and an injury was caused thereby. In some cases notice to municipal corporations, express or implied, of defects or obstructions in the streets, is requisite to create a liability for damages for an injury produced by reason of them, but the authority of these cases has no application here. *Hutson v. Mayor, &c.*, 9 N. Y. 163; *Griffin v. Mayor, &c. Id.* 456.

The judgment of reversal must be affirmed.

All concurred.

Judgment affirmed.

Brown v. Hannibal, &c. R. R. Co.

BROWN v. THE HANNIBAL & ST. JOSEPH
RAILROAD COMPANY.

50 *Missouri*, 461.

Supreme Court of Missouri; August Term, 1872.

Negligence. Injury to person crossing track. Where a public crossing of a railway track is obstructed by a train stopping there to unload the cars, so that passers are obliged to cross at other points, the railroad company is bound to use ordinary care and diligence to prevent injury to them. And where persons are in the habit, when the public crossing is so obstructed, of crossing at another place, the agents and servants of the company are bound to take notice of the fact, and use proper precautions. The company is liable for damages to a person injured by its negligence, at such a point on its track, although such person had no authority to cross the track at that place.

Appeal to the supreme court of Missouri from the circuit court of Clinton county.

This was an action to recover damages for injuries to the person of the plaintiff, received by being run over by the defendant's railway train. The facts of the case are stated in the opinion. The jury found a verdict for the plaintiff, and judgment was entered thereon; from which the defendant appealed.

Hall & Oliver, for the appellant.

Wm. Henry, Jr., for the respondent.

WAGNER, J.—This was an action commenced in the court below by the plaintiff, for the purpose of recover-

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ing damages for personal injuries. It appears from the record that the plaintiff was in the town of Cameron, and wanted to cross the street where the defendant's track was laid upon the same; that before she arrived at the crossing she discovered that a train of cars was standing upon the track and the crossing was obstructed, so that she could not pass at that place. She then turned and crossed the track at a different place, where there was no public crossing, but there was a path where people were accustomed to cross occasionally but it does not seem that the road had ever authorized any body to cross at that particular place. When plaintiff went on the track there was an engine and tender standing about six feet distant, and as she had nearly crossed over, the cars commenced moving and the tender struck her, the wheel passing over one of her legs, just above the ankle, crushing it so that amputation became necessary. She swears that no signal was given of the moving of the train, and the first notice she had of the cars moving was being struck by them. There was no other evidence tending to prove that no bell was rung when the engine was started. On the other hand, there was evidence going to show that at the time the train was started the bell was rung and the alarm was given. Upon this state of facts the court made the following declarations of law for the plaintiff:

1. "If the jury believe, from the evidence, that the defendant, through the negligence and carelessness of its agents, and without negligence of plaintiff, inflicted upon the plaintiff the injury as mentioned in the petition, they will find for the plaintiff.

2. "Railroad companies, owing to the dangerous character of the business they engage in, are held to the greatest care in the operation of their machinery and vehicles; and if the jury believe from the evidence that defendant's agents or servants, in managing the locomotives or other machinery, failed to use such care and

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caution, by which the injury was done to plaintiff, they will find for plaintiff.

3. "Even if the jury should believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by use of ordinary care and caution, the jury will find for plaintiff."

The court gave all the instructions asked for by the defendant except the sixth, which is as follows :

6. "If the jury believe from the evidence that the injury in proof happened on the railroad track of defendant, and where there was no street or road crossing, the plaintiff can not recover, because the defendant, in the use of the road, is bound to keep a look-out on its own ground, as against those who have no lawful right there, but may use the same for its own lawful purposes ; and any one going on said track where there is no street or road crossing, is there at his own peril and in his own wrong, and therefore can not recover, because his own wrong has contributed to his own injury."

The point raised in this court, that the evidence did not correspond with the petition, we do not think can be maintained. The allegation in the petition was that the injury occurred at a public crossing, and the proof showed that it happened at a private crossing ; but no objection was made to it on that account in the court below, and no advantage was attempted to be taken in the manner pointed out by statute. *Fischer v. Max*, 49 *Mo.* 404 ; *Wagn. Stat.* 1033, § 1.

With the weight of testimony we have nothing to do. It is sufficient for us that both parties introduced evidence tending to prove their respective allegations. The authorities mostly cited and relied on by the de-

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fendant are from courts where the established law is that the courts themselves determine what is negligence, and take the case from the jury when, in their opinion, the evidence shows that the plaintiff has been guilty of any carelessness or negligence which contributed to the accident. But in this state a different rule prevails, and where there is any evidence in regard to the issues, the question of negligence must be submitted to the jury under instructions from the court.

To the first instruction given to the jury at the instance of the plaintiff no reasonable objection can be made. It makes the defendant liable if its agents carelessly and negligently inflicted the injury, without the plaintiff being guilty of any negligence which contributed thereto. In reference to the second instruction as applied to this case, there is some doubt. It asserts a correct proposition of law, and if the plaintiff was legally and rightfully on the track, of its application there could be no question. But, owing to the peculiar and clearly proved facts, we think this instruction may very properly be considered in conjunction with the next succeeding or third instruction, which is entirely unobjectionable. *Huelsenkamp v. Citizens' R. Co.*, 37 *Mo.* 537; *Morrissey v. Wiggins' Ferry Co.*, 43 *Mo.* 380; 47 *Mo.* 521.

The crossing was obstructed by the defendant's train, and the plaintiff, therefore, to pursue her journey, turned away and crossed at another place, where people were accustomed to cross, but it does not appear that they had any license therefor.

The defendant had the right to stop its train at the crossing for a reasonable time, but when the train did stop, and obstructed the crossing for the purpose of unloading cars, as was the case here, were travelers always obliged to wait, before they could continue their business, till the cars were unloaded? While the railroad company is the absolute owner of its track, and

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has the right to its free and unmolested use, still it is not absolved from the exercise of ordinary care and diligence to prevent injury to others when they happen on the track under the circumstances in which the plaintiff was placed. Greater care and foresight must necessarily be used within the limits of a town than would be required in the country. In towns caution should always be used. There is no absolute rule as to negligence to cover all cases. That which is negligence in one case, by a change of circumstances will become ordinary care in another, or gross negligence in a third. Circumstances, time, and place must be taken into the account, and the relative degrees of care, or want of it, grow out of the surroundings and conduct of both parties. The degree of care required of persons having charge of locomotives and cars, upon tracks in towns, varies according to the circumstances of the case, and must be proportioned to the danger to be apprehended of inflicting injury upon others. The rule which would apply in one case, or at a certain given time, might be entirely inadequate as a test when applied to a different state of things. As the crossing was obstructed by the act of the defendant, and persons were in the habit of going over the private way, we think that the agents and servants of the defendant were bound to take notice of these facts, and use a precaution commensurate with them.

The instruction refused for the defendant proceeds upon the hypothesis that, as the plaintiff was on the road track where there was no road or street crossing, she can not recover, whether the defendant was negligent or not. This proposition, I admit, has many authorities to support it. But a contrary doctrine was quoted approvingly in this court, in *Huelsenkamp v. Citizens' Railway*, *supra*, where cases were cited to show that for an injury negligently inflicted the defendant might be held liable, though the plaintiff was

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a trespasser. See *Lynch v. Nurdin*, 1 *Adolph. & El. N. S.* 29, per Lord DENMAN, Ch. J.; *Robinson v. Cone*, 22 *Vt.* 213; *Birge v. Gardiner*, 19 *Conn.* 507.

This principle springs immediately out of the common and familiar rule that every person shall use his own property so as not to hurt or injure another. It is in accordance with this principle that, though a person do a lawful thing, yet if any damage thereby befalls another, which he could have avoided by reasonable and proper care, he shall make reparation. As before remarked, the defendant's right to the exclusive and unmolested use of its railroad track is undeniable. And we may concede for the argument that the plaintiff had no right to be on the track, and that she was there improperly, and still it does not follow that she can not recover for an injury inflicted upon her negligently. The right of the defendant to the free, exclusive, and unmolested use of its railroad is nothing more than the right of every other land proprietor in the actual occupancy and use of his lands, and does not exempt it from the duty enjoined by law upon every person so to use his own property as not to do any unnecessary or avoidable injury to another. The fact that one person is in the wrong does not in itself discharge another from the observance of due and proper care toward him, or the duty of so exercising his own rights as not to injure him unnecessarily. *Kerwhacker v. C. C. & C. R. R. Co.*, 3 *Ohio St.* 172.

The cases are numerous where parties have been held responsible for their negligence, although the party injured was, at the time of the occurrence, culpable, and, in some of the cases, in the actual commission of a trespass. Thus, in *New Haven Steamboat, &c. Co. v. Vanderbilt*, 16 *Conn.* 421, the supreme court of Connecticut held it to be a principle of law that while a party on the one hand shall not recover damages for an injury which he has brought upon himself,

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neither shall he, on the other hand, be permitted to shield himself from an injury which he has done, because the party injured was in the wrong, unless such wrong contributed to produce the injury; and even then it would seem that the party setting up such defense is bound to use common and ordinary caution to be in the right.

In *Birge v. Gardiner*, 19 *Conn.* 507, the same court says: "There is a class of cases in which defendants have been holden responsible for their misconduct, although culpable acts of trespass by the plaintiffs produced the consequences." In the case of *Bird v. Holbrook*, 15 *Eng. Com. Law*, 91, it was held that where the defendant, who, for the protection of his property, some of which had been stolen, set a spring-gun, without notice, in a walled garden, at a distance from his house, and the plaintiff, having climbed over the wall in pursuit of a stray fowl, was shot, he, the defendant, was liable in damages, although the plaintiff brought the injury upon himself by trespassing upon the defendant's inclosures.

The case of *Vere v. Lord Cawdor*, 11 *East*, 568, was an action of trespass for shooting and killing a dog of the plaintiff's, in which it was held that a plea in bar constituted no justification. It set forth that the lord of the manor was possessed of a close, and that the defendant, as his gamekeeper, killed the dog when running after hares in that close for the preservation of hares, the plea not averring that it was necessary to kill the dog for the preservation of the hares, &c. In this case Lord ELLENBOROUGH, Ch. J., said: "The question is, whether the plaintiff's dog incurred the penalty of death for running after a hare in another's ground. And if there be any precedent of that sort, *which outrages all reason and sense*, it is of no authority to govern other cases."

To the same effect is the case of *Colchester v.*

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Brooks, 53 *Eng. Com. Law*, 376, cited in 1 *Smith's Lead. Cas.* 132, *a*, where it was held that, although the plaintiff was chargeable with wrong and negligence in placing and keeping the deposit of a bed of oysters in the channel of a navigable stream, which created a public nuisance, yet the defendant was not justifiable in running his vessel upon the deposit, greatly injuring the oysters, when there was room to pass in the stream without it, and the injury could have been avoided by the use of reasonable care and diligence.

These authorities might be greatly multiplied, but a sufficient number have been cited to show the established rule. And in the Ohio case, before referred to, it is declared by the court that "where a party has in his custody or control dangerous implements or means of injury, and negligently uses them, or places them in a situation unsafe to others, and another person, although at the time even in the commission of a trespass, or otherwise somewhat in the wrong, sustains an injury, he may be entitled to redress." This we think is fully as broad as the instructions given in this case. The sixth instruction asked by the defendant and refused by the court was properly refused.

The instructions given for the plaintiff, under all the circumstances of this case, when taken together, were not objectionable, and furnish no reason for a reversal. The judgment in the court below having been for the plaintiff, will be affirmed.

All concurred.

Judgment affirmed.

Rolke v. Chicago, &c. R. Co.

ROLKE v. THE CHICAGO & NORTHWESTERN
RAILWAY COMPANY.

26 Wisconsin, 537.

Supreme Court of Wisconsin ; June Term, 1870.

Negligence. Injury by fire. Sparks from a construction train on the defendant's railway set fire to combustibles on the track ; but, although this was known to defendant's servants in charge of the train, they took no means to extinguish the fire or prevent its spread. *Held*, that this was negligence on the part of the defendant, which rendered it liable to the plaintiff for damages to his property, caused by the spread of the fire.

It seems, that had the train been a passenger train, instead of a gravel train engaged in the repair of the road, a failure to stop the train and leave men to extinguish the fire might not have been negligence.

Error from the supreme court of Wisconsin to the county court of Winnebago county.

This was an action to recover damages caused by fire kindled on the defendant's railway track by a spark from its locomotive, and which spread to and destroyed property of the plaintiff. The questions arising in the case appear from the opinion. The jury found a verdict for the defendant, and judgment was entered, to review which the plaintiff brought this writ of error.

Felker & Weisbrod, for the plaintiff in error.

Gabe Bouck, for the defendant in error.

COLE, J.—Among other instructions asked by the plaintiff, which the county court refused to give, was

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one in substance and to the effect that if the jury found from the evidence that the engine set a fire on the track of the roadway on the day named, adjoining the premises of the plaintiff, and that the servants of the defendant in charge of such engine and train knew such fire to be so set and kindled, then the servants of the company were bound to use ordinary care and diligence to extinguish such fire ; and if the servants of the defendant knew the fire was so set at or about the time it was so set, and used no efforts whatever to extinguish such fire, but went away and left it burning, such conduct on the part of the servants of the company was evidence of negligence, and ought to be taken into consideration in determining the question whether the train was managed with care with regard to fire. We think this instruction should have been given. It appears that the train in question was a gravel train, engaged in the repair of the road-bed, and had about twenty-eight men on the train. And even if it had been prudent and necessary for the train itself to move off to the proper station as soon as it was unloaded, in order to avoid collision with other trains, what difficulty was there in leaving behind a sufficient number of men to put out the fire ? It was a dry time in the summer, when a fire kindled upon the track of the road would very likely spread to the adjoining premises. Men of ordinary care would, under such circumstances, use proper diligence to prevent the fire from communicating to the property of others. And, if, according to the hypothesis upon which the instruction is framed, the employes of the company knew that a fire had been kindled on the track by means of the locomotive, they were certainly bound to use ordinary care and diligence to extinguish it ; and if they used no efforts whatever to extinguish it, but went away and left it burning, such conduct, we think, would amount to gross negligence.

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These remarks are made with reference to the character and condition of the train in question. It was a gravel train, and there could be no difficulty, even if the train moved off, in leaving behind a portion of the men to look after the fire. In the case of an ordinary freight or passenger train, even if the employes knew the locomotive had kindled a fire upon the track, yet it might not be possible to stop the train and put it out, or leave behind any one for that purpose. The safety of the train and passengers would be a matter of first importance, and negligence could not necessarily be imputed if the servants left the fire burning without using any efforts to extinguish it. But the instruction, when applied to the facts of this case, raises quite a different question; and that is, whether when a fire has been set by a gravel train, which has a large number of men on the train who know about the fire, they can all go away, leaving the fire to spread and destroy the property of others, without being guilty of negligence. It seems to us that such conduct on the part of the servants of the company would almost deserve the warm language used by Judge BREESE, in *Bass v. Chicago, &c. R. R. Co.*, 28 *Ill.* 9-19, as being "unworthy of civilized and Christian men." At all events, if the jury found from the evidence that the supposed facts were established, we have no doubt the company would be liable for the loss occasioned by the fire.

Without alluding to the other questions discussed, we reverse the judgment, and send the case back for a new trial, on account of the error in refusing to give the instruction above referred to.

Judgment reversed.

Chapman v. Chicago, &c. R. Co.

CHAPMAN v. THE CHICAGO & NORTHWEST-
ERN RAILWAY COMPANY.

26 Wisconsin, 295.

Supreme Court of Wisconsin; June Term, 1870.

Negligence. Admissions. In an action to recover damages for the destruction of property by fire communicated from a locomotive, admissions made by a defendant as to the cause of the fire may be received in evidence, although they were made upon information derived from others, and not upon facts within the knowledge of the party himself.

Contracts. Officers. Evidence. To render a contract, alleged to have been made on behalf of a railroad company by its general superintendent, admissible in evidence against the company, the fact that he was such officer, and his authority to make such contract must be shown.

Negligence. Damages. Interest. The damages recovered in an action against a railway company for the negligent destruction of the plaintiff's property, by fire communicated from the defendant's locomotive, may properly include interest on the value of the property destroyed, from the commencement of the action.

Appeal to the supreme court of Wisconsin from the circuit court of Winnebago county.

This was an action by Chapman and Danforth against the Chicago & Northwestern Railway Company, Barron, and Campbell, to recover damages for the destruction of lumber belonging to the plaintiffs, by fire communicated from the defendant's locomotive. The locomotive was owned by the Chicago & Northwestern Railway Company, but was, at the time the fire originated, running upon the track of the Oshkosh City Railway, under the control of the defendants,

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Barron and Campbell, who then operated that railway.

The Chicago & Northwestern Railway Company answered separately, setting up, besides a general denial, allegations that it had nothing to do with the operation of the Oshkosh City Railway, but that its cars, engines, and servants were used at certain hours upon that railway, under special arrangement between the company and the defendants, Barron and Campbell, by which the latter had sole charge, and operated the city railroad for their own use.

Upon the trial, the evidence for the plaintiffs tended to show that the fire originated as by them alleged, though no witness testified to having seen sparks or coals from the locomotive actually fall upon the lumber where the fire started. On the part of the defendants the testimony tended to show that the fire did not so originate, and that it might have come from sparks from the plaintiff's own mills.

Danforth, one of the plaintiffs, testified that next day after the fire he had a conversation in relation to it with the defendant Campbell, and in reply to the latter's inquiries how the fire originated, told him that the locomotive went up the road with the spark-catcher up, and also what else he knew or had heard about the matter. He was also asked, "What did Campbell say?" This question was objected to by the defendants. The objections were overruled, and the witness answered:

"He said that if that was so, the railroad company was liable. He said it was damned carelessness; that they had a contract with the Chicago & Northwestern Railway Company, requiring them to run with care and prudence, the same as Campbell and Barron had with the city railroad. He said he should order them not to run cars on such windy days; said it was a great expense to run cars upon such a windy day."

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The record showed that this testimony was offered only as to defendants Barron and Campbell. The plaintiff's evidence also showed that the locomotive was owned by the defendant company.

The railway company moved for a nonsuit as to it, which motion was denied. It then offered in evidence a contract between it and the defendants, Barron and Campbell, to contradict the testimony of Danforth as to the conversation between him and Campbell. The instrument stated that the company had caused it to be executed by its general superintendent, thereto duly authorized. It was signed "*Chicago and Northwestern Railway Company*, by GEO. L. DUNLAP, General Superintendent;" and by the other defendants. It was objected to and excluded on the ground, among others, that there was no proof of authority on the part of Dunlap to execute it for the company.

Campbell, sworn as a witness for the railway company, was then asked, "Under whose care and direction were the men engaged in operating the said locomotive on said city road?" This was objected to and excluded as irrelevant, and on the ground that the liability of the parties must be determined by contract. The witness then testified that there was a subsequent verbal contract with Mr. Dunlap, the superintendent of the defendant company, about running said locomotive over said city railroad. This was objected to as irrelevant, and because no authority had been shown in Dunlap, and excluded.

Among others, the following instruction was given the jury: "In case you find the defendants or either of them liable, you will award the plaintiffs such actual or immediate damage as they suffered through the negligence of the party whom you charge, *with interest* thereon from the commencement of this suit." Upon their second return, the court gave the following instruction, after writing the same out upon the judge's

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minutes: "You need not require the testimony of living witnesses who actually saw the fire at the time it originated, and who of their own knowledge can speak with absolute certainty as to its cause; but circumstances may be sufficient, if they produce the conviction in your minds, as reasonable and intelligent men, that in fact it originated from the locomotive, and through the carelessness or negligence of those having it in charge."

The jury found a verdict for the plaintiffs, and against all the defendants. The defendants moved for a new trial, for errors in the rulings and instructions of the court, because the verdict was against the law and the evidence, and for certain irregularities alleged to have occurred after the jury retired, and before the verdict was returned.

Their motions were denied, and judgment was entered on the verdict; from which the defendants appealed.

Gabe Bouck, for the appellants.

Felker & Weisbrod, for the respondents.

DIXON, Ch. J.—The admissions of the defendant Campbell, made by him to the plaintiff Danforth, and testified to by the latter as a witness upon the stand, were not erroneously received in evidence. It is true, that they were evidence of very little weight. They were hypothetical, made on the supposition that the information he received from Danforth was correct with regard to the origin or cause of the fire. If that information was correct, then he admitted the fact of negligence, and that the railroad company was liable. It is to be presumed that the jury, who knew all the facts, would take the admissions for just what they were worth. If they should find the representations of Dan-

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forth correct with regard to the cause of the fire, then they would consider the admissions upon the question of negligence, and it would be right that they should do so, at least as against the defendant Campbell. It is not necessary that admissions, to be received in evidence, should be as of facts within the knowledge of the party making them. They may be made upon information derived from others, and still be given in evidence against the party. This was so held by this court in *Shaddock v. Clinton*, 22 *Wis.* 118, 119. The admissions were, therefore, properly received; and, if it was improper for the jury to consider them as against the other defendants, the remedy was by asking a special instruction to that effect; and, inasmuch as no such instruction was asked, the only question before us is, whether they were admissible for any purpose, or as against any of the defendants. *Bonner v. Home Ins. Co.*, 13 *Wis.* 686. We think, as above stated, that the evidence was admissible against the defendant Campbell; and, that being so, the exception must be overruled.

The alleged written contract between the defendants Barron and Campbell and the defendant railway company, was properly rejected, for the reason given at the time. There was no proof that Dunlap, by whom the contract purported to have been executed in behalf of the company, was the general superintendent as therein represented, or that, as such superintendent, he had any authority to use the name of the company, or to bind it by his signature to such a contract. And the proof offered to show a verbal agreement between the same parties, was also properly rejected on the same ground. That too, as the offer shows, was an agreement with Dunlap, whose authority to make the same or to bind the company was not shown, or offered to be shown.

The exception to the instruction that the jury should

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award interest from the time of the commencement of the action, upon such damage as they should find the plaintiffs had sustained, must also be overruled. The damage of the plaintiff was the value of the property destroyed. That value was readily ascertained. The amount or quantity of property destroyed being shown, the value was a matter of mere computation. It was, therefore, as if the court had instructed the jury that the damages of the plaintiffs would be the value of the property destroyed, with interest from the time of the commencement of the action. In trespass, trover, or replevin for the same property, taken or converted by the defendants, such would have been the legal rule of damages ; or rather, the value with interest from the time of the taking or conversion. Why should not the same rule prevail in this action ? We are at a loss to assign any good reason for the distinction, if it can be said that it exists, or if it can be said to be in the discretion of the jury to give interest by way of damages in this case, while in the others they must give it as matter of strict legal right. We say we can see no good reason for the discrimination. The object of the rule, or of any rule of damages in any of the cases, is to give just and full compensation for losses actually sustained. It is obvious, regard being had to such compensation, which constitutes the foundation of the rule, that the giving of interest is as essential in this case as in any of the others. It is immaterial to the party who has lost his property, whether it has been taken and converted, or negligently destroyed by the other party. His loss is the same in either case, and in either case he should be entitled to the same compensation. It may be that the authorities do not fully sustain this rule. We are inclined to think they do not ; and yet they do not establish the contrary. We find no case in which it has been held that such an instruction was erroneous ; and the tendency of modern decisions would clearly appear

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to be to sustain it. At all events, we are willing to rest our decisions upon the reason or principle which, it seems so apparent, should govern in such cases.

[The remainder of the opinion, relating to various irregularities in giving instructions to the jury, and in regard to the custody and conduct of the jury after their retirement and before the verdict, is omitted. The objections on these grounds were also overruled.]

Judgment affirmed.

PIERCE v. THE WORCESTER & NASHUA
RAILROAD COMPANY.

105 *Massachusetts*, 199

Supreme Court of Massachusetts; October Term, 1870.

Negligence. Injury by fire. Damages. The fact that, in estimating the compensation to an owner of land taken for the construction of a railway, damages from the exposure of his buildings to fire are included in the amount awarded, will not defeat the right of a subsequent grantee of the buildings, who was not a party to the proceedings, to recover damages for the destruction of such buildings by fire communicated to them by the negligence of the railway company. *So held*, in an action brought under *Mass. Gen. Stat.*, ch. 68, § 101, which gives a right of action for such a loss, whenever shown to have been caused by passing engines.

Negligence. Injury by fire. Evidence. In an action to recover damages for the destruction of the plaintiff's buildings by fire communicated to them from the defendant's locomotive, the admission of evidence of the direction of the wind and state of the weather at the time at a place five miles distant is not erroneous, where it does not appear to have misled the jury.

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Appeal to the supreme court of Massachusetts from the superior court.

This was an action of tort for the destruction of the plaintiff's buildings by fire communicated from the defendant's locomotive.

Upon the trial it appeared that, at the time of the location and construction of the defendant's railway, the buildings in question were owned by John D. Lovell, by whom they were afterwards conveyed to James D. Moore, who subsequently, and before the fire, conveyed them to the plaintiff; both deeds containing covenants of full warranty and against incumbrances. The plaintiff introduced evidence tending to show that soon after two o'clock on the afternoon of December 26, 1868, fire was discovered upon the roof of one of the buildings, a few minutes after a locomotive engine of the defendant had passed over their railroad track, which was only sixty feet distant, in a northwesterly direction from the building; that the wind was blowing at the time from the northwest, and that the fire spread, and consumed all the buildings.

One of the plaintiff's witnesses was the assistant superintendent of the state lunatic asylum at Worcester, five miles south of the plaintiff's buildings.

He testified that he kept at the asylum a record of meteorological observations, made three times daily; and "was allowed, against the defendant's objection, to testify, from his minutes, as to the state of the weather at the asylum on said 26th of December, in the morning, at two o'clock in the afternoon, and in the evening, and testified that at two o'clock the wind was from the northwest; and was allowed, against the defendant's objection, to testify to the state of the weather for the two or three days preceding, and stated that it was stormy on the 23d of December, and that there was

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no storm between that time and the time of the burning of the plaintiff's buildings."

The defendant offered to prove that, when the railroad was constructed, Lovell, who then owned the farm, petitioned the county commissioners to estimate his damages "occasioned by laying out, making, and maintaining the railroad, and taking land and materials therefor;" that the commissioners estimated his damages, including, among other elements of damage, as appeared from the records, "risk of buildings against fire, and all inconvenience to said farm;" that Lovell was dissatisfied with their estimate, and had a jury to assess damages, according to the statute; that at the hearing before the jury he offered evidence upon the subject of the risk of his buildings from fire from the locomotive engines, and claimed increased damages on account of that danger; that the jury took the subject into consideration, and awarded damages to him, among other things, for danger to his buildings from fire in consequence of running the railroad track so near to them; that the defendant paid the award, and took a receipt from him in full for all damages so assessed; that the full amount of damages estimated by the county commissioners was five hundred and eighty-four dollars and nineteen cents, and the amount assessed by the jury was nine hundred and fifty-three dollars; and that the buildings burned were the same which stood upon the land at the time of this assessment of damages, and had never been changed in any respect. The defendant also offered to show that Lovell, at the time of the assessment, understood that it included all risk from fire which might be communicated by the defendant's locomotives, and that the track ran so near to the buildings as to cause imminent and appreciable danger from fire.

The judge excluded all the evidence relating to the proceedings before the county commissioners and the

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jury, and the records of those proceedings, on the ground that the facts offered to be proved would constitute no defense to the action.

The jury found a verdict for the plaintiff. The defendant alleged exceptions.

H. B. Staples, and *F. P. Goulding*, for the defendant.

P. E. Aldrich, for the plaintiff.

COLT, J.—The defendant denies the plaintiff's right to recover under the statutes for the loss of his buildings by fire communicated from a locomotive, on the ground that, when the railroad was located and built, Lovell, who then owned the plaintiff's premises, at the hearing upon his petition for the assessment of damages, claimed compensation, not only for so much of the land as was taken, but also for the risk and danger to these very buildings by fire, produced evidence in support of his claim, and was in fact awarded additional damages on that account.

The jury could not lawfully take into consideration any damages not directly occasioned by laying out, making, and maintaining the railroad, and would seem to have no right, as an element of damage, to determine how much the owner should receive in discharge of the defendant's liability for the future destruction of his buildings by fire from the defendant's engine. To what extent it is proper for the jury to contemplate such contingencies, it is not here necessary to discuss. *Presbrey v. Old Colony, &c. R. Co.*, 103 *Mass.* 1; *Walker v. Same*, *Id.* 10; *Proprietors of Locks v. Nashua, &c. R. R. Co.*, 10 *Cush.* 385; *Boston, &c. R. R. Co. v. Old Colony R. R. Co.*, 12 *Id.* 605; *Dodge v. County Commissioners*, 3 *Metc.* 380.

It is a sufficient answer to the defendant's offer of

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evidence, that damages on account of exposure to fire, even if proper to be allowed, must be presumed to have been estimated by the jury in reference to and making due allowance for the indemnity provided by the statute, whenever the loss is shown to have been caused by passing engines. It is plain that this indemnity is not so perfect and complete as to preclude, in the estimate of damages, a consideration of the direct effect of a constant liability to destruction by fire from this new source, upon the present value of a dwelling, erected upon the remaining portion of the estate, as a safe and comfortable residence, or for purposes of sale. The present value of the property must be to some extent depreciated, although there is a chance that the buildings may never be destroyed by fire, and although, if they are, it is certain that the owner, whoever he may then be, will be indemnified under the statute for the actual loss he sustains. The injury to be measured in the assessment of damages occasioned by the location of the railroad, in this respect at least, is broader than the indemnity of the statute. In fact, the latter rests on entirely different principles. No owner of buildings, however near the track, or however great the danger, can recover damages on account of the location and construction of the road, unless some part of his estate was taken, or directly affected; while for injury by fire, under the statute, whenever it happens, the road is responsible, although the building may be far removed from the track, and erected since the road was built. *Perley v. Eastern R. R. Co.*, 98 *Mass.* 414.

But further, if the jury included in their verdict a sum which, upon some doubtful computation of chances, would be equivalent, in their opinion, to an insurance against this risk, and it was paid to an owner of this estate, we do not see, under the circumstances offered to be shown, how it would defeat the

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right of such owner himself to recover for a loss under the statute. It would not amount to a release or waiver of his claim, and there was no promise or agreement on his part, founded on any consideration, not to claim damage in case of actual loss. *Seymour v. Carter*, 2 *Metc. (Mass.)* 520,. It is at most the mistake or fault of the jury. And to give effect to this defense would be like allowing the defendant to show, in an action for a personal injury to the plaintiff himself, or to his cattle, upon the track, that the jury considered such exposure in their estimate of damages, when the land was taken. It is not easy to see why the same defense would not be equally well founded, against one who had conveyed the right of way to the corporation upon a price agreed, and which must be presumed to have been fixed by the owner, to cover all inconvenience and risk. *Lyman v. Boston, &c. R. R. Co.*, 4 *Cush. (Mass.)* 288.

Finally, the evidence offered, as against the present plaintiff, was clearly incompetent. No damages were assessed in his favor. He was not then the owner. The additional risk and expense of protecting these buildings against fire were incident to the estate when he became its owner. And in the language of SHAW, Ch. J., in *Hart v. Western R. R. Co.*, 13 *Metc. (Mass.)* 99, 105, "This indemnity, provided by law against a special risk, may be considered as a quality annexed to the estate itself, and passing with it to any and all persons who may stand in the relation of owners."

The meteorological observations at the asylum, which were admitted in evidence, do not appear to have been so remote as to mislead the jury as to the general direction of the wind.

Exceptions overruled.

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ABANDONMENT.

A railroad company which had acquired the right of way through certain streets of a city, subsequently transferred its right to another company, which took up the rails outside the city for a distance of a mile, transferred them to a new track around the city, and contracted with the owner of the land taken for such new track to procure a release from the former company to him of the land from which the track had been removed. The portion of the track within the city remained connected at one end with the main track of the latter company, and was used as a switch or side track. *Held*, that this was not an abandonment of the right of the former company to maintain a track through the streets of the city. *City of Columbus v. Columbus & Shelby R. R. Co.*, 70.

ACCEPTANCE.

As to effect of acceptance of goods to be delivered beyond terminus of railway, see CARRIERS, 6-12, 25-31.

As to effect of acceptance of bill of lading without objection, see CARRIERS, 20.

ACTION.

As to the jurisdiction of actions against railway companies, see JURISDICTION.

As to right of action for loss of goods by carrier, see CARRIERS, 2, 13, 14, 37-39.

For injury from explosion of goods in course of transportation, see CARRIERS, 32-36.

For injury to passengers, or their baggage, see CARRIERS, 54, 55, 62, 68; NEGLIGENCE, 1-6.

For injury to adjoining premises from construction or operation of railway, see HIGHWAYS, 6; LANDS, 25, 26, 30, 31.

ACTION.—Continued.

For negligence, see NEGLIGENCE, 9-18.

For penalties, see PENALTIES.

To cancel subscription to stock, see MUNICIPAL CORPORATIONS, 6, 8.

As to the place of commencing actions, see PROCESS, 1.

AGENCY.

As to when a carrier is agent of the owner of goods received for transportation, see CARRIERS, 23.

AGREEMENTS.

See CONTRACTS.

ASSESSMENT.

As to the mode of assessing damages for property taken for or injured by the construction of a railroad, see LANDS, 10, 17-24, 28-31.

As to assessment of taxes upon railway stock, earnings, and property, see TAXES.

ATTORNEYS.

As to employment of attorneys, see OFFICERS.

BAGGAGE.

As to liability for injury to baggage, see CARRIERS, 68-70.

BILL OF PEACE.

As to jurisdiction of equity upon proceedings in the nature of a bill of peace, see EQUITY, 2.

BILLS OF EXCHANGE.

1. An instrument in writing in the form of a bill of exchange, drawn by the president of a railroad company upon the treasurer of the company by order of the directors, and attested by the secretary,—*Held*, to be a bill or note for the direct payment of money, within the meaning of a statute regulating the time to answer in actions upon bonds, bills, or notes for the direct payment of money or property. *Gilstrap v. St. Louis, Macon, & Omaha Air Line R. R. Co.*, 245.
2. A draft or order drawn by one officer of a railroad company upon another, and accepted by the latter, may be regarded as the promissory note of the company. But evidence explaining the circumstances under which a draft was accepted and delivered, is admissible in an action against the company for goods sold and delivered to a contractor, by direction of the

BILLS OF EXCHANGE.—Continued.

company, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the draft. *Chicago, Cincinnati, & Louisville R. R. Co. v. West*, 239.

BILLS OF LADING.

Where, upon delivery of goods to a railway company for transportation, the shipper takes from the agent of the company a bill of lading, receipt, or other voucher, acknowledging the receipt of the goods, and expressing the purpose for which and the terms upon which they are received, all prior negotiations and agreements between the parties upon the subject are superseded by such formal written agreement; and by it, and it alone, where mistake or fraud is not shown, the duties and liabilities of the parties must be regulated. If the written instrument is complete, making by itself a perfect contract, recourse can not be had to prior parol negotiations to vary its terms. *Long v. New York Central R. R. Co.* 350.

As to the effect of carriers' receipts, see **CARRIERS**, 1.

BONDS.

. As to the power of municipal corporations to issue bonds in aid of railroads, see **MUNICIPAL CORPORATIONS**, 2-8.

CANCELLATION.

As to grounds for cancellation of subscriptions to stock of railway company, see **MUNICIPAL CORPORATIONS**, 6, 8.

CARRIERS.

1. A receipt for goods, given by a railway company, in the usual form of a carrier's receipt, implies an agreement to transport the goods to their destination, if it is upon the line of the railway. *Lands v. Pacific R. R. Co.*, 288.
2. Where goods received by a railway company, as a common carrier, for transportation, are lost, an action for damages can be maintained by the owner. The consignee has no right of action, except as owner of the goods. *Id.*
3. In an action against a railway company to recover damages resulting from its delay in transporting property actually received by it as a common carrier for transportation, the fact that the delay was caused by the defendant's lack of proper means of transportation is no defense. *Tucker v. Pacific R. R. Co.*, 291; *Faulkner v. South Pacific R. R. Co.*, 293.
4. The measure of damages in such a case is the difference between the price of the property at the time when it should have

CARRIERS.—Continued.

been delivered, and the time when it was actually delivered. *Ib.* ; *Ib.*

5. *So held*, where, by reason of an unusual press of business, the rolling stock of the defendant was inadequate to transport, promptly, the accumulation of goods shipped. *Faulkner v. South Pacific R. R. Co.*, 293.
6. The rule established by decisions in Illinois, that a railway company receiving grain for transportation, may be compelled to deliver such grain to any elevator which it has allowed to be connected by a switch with its own line, should not be extended to a case where, although tracks exist connecting the railway with a certain elevator, yet a delivery of grain to that elevator will cause great expense to the railway company, and great derangement of its general business, and where such connecting tracks have never been made a part of its line by use. *Chicago & Northwestern R. Co. v. People of Illinois ex rel. Hempstead*, 296.
7. But where such connecting tracks are in part owned by the railway company, and are a direct continuation of its line, easy of access, and are used by the railway company to deliver grain to other elevators situated thereon, as well as to deliver other freight, such tracks are to be regarded as part of the line of railway, and grain consigned to such elevator, and received by the railway company for transportation, must be delivered thereto. *Ib.*
8. These principles applied, in a peculiar case, where different lines of railway, though owned by the same corporation, and having a common name, were substantially distinct roads, constructed under different charters; and where connecting tracks leading to a certain elevator had been laid and used for the convenience of two of such lines, but not of the third. *Ib.*
9. Where grain is consigned in bulk to a particular elevator on the line of a railroad, it is no sufficient excuse for the refusal of the company so to deliver it, that it can not do so without large additional expense caused by the loss of the use of motive power, labor of servants, and loss of use of cars while they are being delivered and unloaded at such elevator, and brought back. It is for that expense that freight is paid to the company. *Ib.*
10. Nor is the fact that a railway company has entered into contracts with the owners of other elevators at the same point, for exclusive delivery of grain to them to the extent of their capacity, a valid excuse, as against one not a party to such contracts, for refusing to deliver grain to an elevator upon the

CARRIERS.—Continued.

line of its road, to which such grain is consigned. Railway companies can not be released from the duties which, as common carriers, they owe to the public, except by the consent of every person who may call upon them to perform such duties. Among these is the obligation to receive and carry goods for all persons alike, without injurious discrimination as to terms. *Ib.*

11. Nor can a railway company refuse to receive and deliver grain in bulk, consigned to a particular elevator on its line of road, on the ground that, as a common carrier, it is bound to carry and deliver only according to the custom and usage of its business, as established by itself, and that, never having held itself out as a carrier of grain in bulk, except upon the condition that it might itself choose the consignee, this has become the custom and usage of its business. A railway company can establish no custom inconsistent with the spirit and object of its charter. *Ib.*
12. To compel a railway company to deliver to a particular elevator grain in bulk consigned thereto upon the line of its road, the writ of mandamus is proper, there being no other adequate remedy. *Ib.*
13. Where goods are shipped by railroad in pursuance of a previous agreement between the consignor and consignee, under circumstances showing an intent on the part of the consignor that the title to them shall vest in the consignee upon delivery to the railroad company, as carrier, and the railroad company receipts for the goods, and agrees to transport safely and deliver them to the consignee, if by the subsequent direction of the consignor, the railroad company delivers the goods to another person than the consignee, the company is liable to the consignee for a conversion of the property. *Bailey v. Hudson River R. R. Co.*, 818.
14. Where goods are fraudulently ordered in a fictitious name, and are shipped by railway, in compliance with the order, directed to such fictitious name, the railway company which receives and transports the goods, if it delivers them to a stranger giving such fictitious name, without requiring from him evidence of his identity, is liable to the consignor for the value of the goods. *Price v. Oswego & Syracuse R. Co.*, 825.
15. In an action against a railway company, for a failure to deliver goods received by it for transportation as a common carrier, the complaint must show that, after the receipt of the goods by the defendant, and before the demand for their delivery was made, the goods had actually been transported to their

CARRIERS.—Continued.

destination, or that a reasonable time had elapsed for their transportation, in due course, or that the defendant had converted them to its own use; and the complaint must also show that the defendant's reasonable freight and charges have been paid or tendered, or some sufficient reason or excuse for not doing so must be alleged. *Jeffersonville, Madison, & Indianapolis R. R. Co. v. Gent*, 335.

16. A consignee of goods, whether they are transported by water or railroad, is entitled to reasonable notice from the carrier of their arrival, and to a fair opportunity to remove them. Where goods are shipped by railroad, and before reaching their destination, are, without the knowledge of the consignee, transferred by the carrier to a steamboat, and are transported to their destination by such steamboat, the consignee is under no obligation to be on the look out for them at the wharf. And where the consignee is unknown to the carrier, the latter is liable for the consequences of neglecting to make a diligent effort to find him. *Zinn v. New Jersey Steamboat Co.*, 340.
17. Where a carrier neglects to give notice to the consignee of his readiness to deliver goods on their arrival, and from the consequent delay in delivery, the goods depreciate in value, the subsequent neglect of the consignee to remove them within a reasonable time, after notice is actually given him, can not be considered contributory negligence on his part, which will relieve the carrier from liability for the depreciation. The duties of carrier and consignee are not concurrent, but in succession, and their negligence can not contribute to the same injury. *Id.*
18. What is a reasonable time for the consignee of goods transported by railroad to remove them after notice of their arrival is given him, is, where the facts are not disputed, a question of law for the court. And if it is submitted to a jury, and their decision is different from what the law determines, the judgment will be reversed. *Hedges v. Hudson River R. R. Co.*, 346.
19. A consignee of goods transported by railroad is not excused from his duty of removing them within a reasonable time after notice of their arrival, by the pressure of other business. Any time given to other matters, after he receives such notice, can not be allowed to him in determining what is a reasonable time to remove the goods. *Id.*
20. Where, upon delivery of goods to a railway company for transportation, the shipper takes from the agent of the company a bill of lading, receipt, or other voucher, acknowledging the

CARRIERS.—Continued.

receipt of the goods, and expressing the purpose for which and the terms upon which they are received, all prior negotiations and agreements between the parties upon the subject are superseded by such formal written agreement; and by it, and it alone, where mistake or fraud is not shown, the duties and liabilities of the parties must be regulated. If the written instrument is complete, making by itself a perfect contract, recourse can not be had to prior parol negotiations to vary its terms. *Long v. New York Central R. R. Co.*, 350.

21. A railroad company transporting property under a special agreement, limiting its liability, occupies the position of a private carrier for hire, and is only liable for the performance of the duty undertaken according to its terms, or for some wrongful act, either willful or negligent. *Penn v. Buffalo & Erie R. R. Co.*, 355.
22. By the terms of a special agreement for the transportation of cattle by railroad, between two points named, the owner of the cattle assumed all risk of injury to them "from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars," and the owner was to load and unload them at his own risk, the railroad company to furnish the necessary laborers to assist. An agent of the owner was to ride free, and take charge of the cattle. The train carrying the cattle was detained at an intermediate station three days by a snow storm, during which trains could not be moved with safety. The cattle could have been unloaded by constructing a platform for the purpose, but this the agent of the railroad company declined to do. In consequence of the delay, some of the cattle died and others were injured. *Held*, that under the contract no duty devolved upon the railroad company other than to transport the cattle in a proper car, safely, and with reasonable dispatch. Whatever was required to be done to prevent injuries from unavoidable delays was to be done by the owner or his agent in charge. The provision for unloading referred to the terminus, and not to an intermediate station; and the injury being attributable to the neglect of the owner's agent to unload the cattle, the railroad company was not liable. *Ib.*
23. A railroad company can not, by contract, relieve itself from liability for the loss of goods delivered to it, as a common carrier, for transportation, if the loss is occasioned by the negligence of itself, its agents, or servants, or if such negligence has in any degree contributed to the loss. A common carrier, and especially one exercising and enjoying corporate

CARRIERS.—*Continued.*

franchises, granted for a public purpose and for the public benefit, can not be permitted to so far disregard its duty to the public as to stipulate for any degree of negligence in the discharge of such duty. *Michigan Southern & Northern Indiana R. R. Co. v. Heaton*, 363.

24. Hence, where property is received by a railroad company for transportation, under a contract providing that the company is not to be held responsible for any damage by fire, this provision does not relieve the company from its responsibility, as a common carrier, for any damage by fire caused by its own negligence or want of care. *Ib.*
25. The superintendent of the defendant, a railway company, in answer to inquiries by B., wrote B. a letter stating that arrangements were perfected for sending cotton through to New York by the defendant's railroad and connecting lines, without detention; the letter also gave the rate of freight to New York, and expressed the hope of securing a liberal share of business. This letter was shown by B. to M., who thereupon shipped a quantity of cotton to New York by the defendant's road and connecting lines, as described in the letter. After passing over the defendant's line, and while in the possession of a subsequent carrier, it was delayed, and during the delay the price of cotton declined. In an action by M. to recover from the defendant his damages caused by the decline,—*Held*, that the letter to B., shown by him to M., and acted on by the latter, did not, without notice by M. to the defendant that he had shipped his cotton under the terms of the letter, constitute an express contract for transportation of M.'s cotton, making the defendant liable for delay occurring beyond the terminus of its own line. *East Tennessee & Georgia R. R. Co. v. Montgomery*, 373.
26. Under a statutory provision that, "if there be several connecting railroads, and goods be intended to be transported over more than one road, such road shall only be liable to its own terminus and until delivery to the next connecting road," *Ga. Code*, § 2058, the receipt of goods by a railroad company intended to be transported over several roads, even on a through rate to be paid at the end of the route, and the giving a written receipt to that effect for such goods, does not constitute an express contract binding the receipting company for the whole distance. *Ib.*
27. The fact that a contract by a railway company for the transportation over its line, and delivery at the terminus thereof, of goods marked to a point beyond such terminus, sets forth.

CARRIERS. — *Continued.*

in the description of the goods, the marks showing their ultimate destination, does not render it a contract for the transportation to and delivery at such destination. Even where, in making such a contract, a printed blank is used, adapted to a contract for transportation over other and connecting lines, if the portions of the contract in writing clearly express that the responsibility of the railway company ceases upon delivery of the goods at its terminus, such written portions must control, and the printed matter inconsistent therewith be rejected as surplusage. *Babcock v. Lake Shore & Michigan Southern R. Co.*, 381.

28. Under such circumstances, the railway company has no authority to make a special contract, on behalf of the owner of the goods, with the next carrier, limiting the liability of the latter. The duty of the first carrier terminates with the delivery of the goods to the second, and the common-law liability of the latter attaches at once, by necessary implication, upon the receipt of them. *Id.*
29. The rule that where a common carrier's contract to transport and deliver goods at a point beyond his own route contains a provision limiting his liability for loss or damage, succeeding carriers receiving the goods from the contracting carrier, for transportation to their destination, are entitled to the benefit of the limitation, does not apply where the first carrier contracts only for the transportation of goods over his own route, and for their delivery to another carrier to be forwarded to their destination. *Aetna Ins. Co. v. Wheeler*, 390.
30. Thus, when a carrier by water receives goods under a contract to carry them to the end of its own route, and there deliver them to a railway to be forwarded over connecting lines to their final destination, the carrier by railway is not entitled to the benefit of any exceptions to the carrier's liability provided for by such contract. And the fact that the contract fixes the freight for the entire carriage at a price which, by agreement of all the carriers, is shared between them, does not make the contract one for the entire carriage, so as to extend its exemptions from liability to any carrier beyond the first. *Id.*
31. Where a common carrier by water and a common carrier by railway, whose lines connect, enter into an agreement for the carriage of goods over the routes of both at a fixed price, to be divided between them, and where they use in common a certain warehouse for transferring such goods from one to the other, each paying a share of the expenses of such transfer, a delivery by the carrier by water at such warehouse of goods intended to

CARRIERS.—Continued.

pass over the railway, and notice to the carrier by railway of their arrival and destination, places the goods in the possession of the latter as common carrier. *Ib.*

32. Manufacturers of explosive and dangerous articles, who send such articles by railway, without giving notice of their character to the railway company, are liable to the company for any damages to its cars and other property, or to property for which it is responsible as a common carrier, caused by an explosion resulting from the inherent tendency of such articles to explode, or from their being improperly packed. *Boston & Albany R. R. Co. v. Shanly*, 396.
33. So, also, manufacturers of such articles are liable to the owners of buildings and other property for any damages to their property caused by an explosion under similar circumstances, and from like causes. *Carney v. Shanly*, 406.
34. But one who orders such articles to be manufactured and sent to him by railway, is not liable for such damages, although he gives no notice to the railway company. *Boston & Albany R. R. Co. v. Shanly*, 396; *Carney v. Shanly*, 406.
35. If two manufacturers of such articles, without giving notice to the carrier, ship different articles of such nature by the same railway car, although without any knowledge of each other's acts, and one such article causes the other to explode, they are jointly liable for the resulting damage. *Ib.*; *Ib.*
36. An action to recover such damages may be maintained, in the name of an owner of property so injured, by the railway company, as assignee of such cause of action. *Carney v. Shanly*, 406.
37. An insurer of goods which are totally destroyed by an accidental fire while in the possession of a railway company as common carrier, after he has paid the loss to the owner of the goods, may recover the amount from the railway company, by suit in the name of the owner. *Hall v. Nashville & Chattanooga R. R. Co.*, 409.
38. This right of the insurer rests upon the doctrine of subrogation, which applies to cases of insurance against fire on land, as well as to cases of marine insurance. *Ib.*
39. To sustain such an action by an insurer, it is not necessary to show any positive wrongful act by the railway company. *Ib.*
40. The charter of a railway company contained a provision that no person should be excluded from the cars on account of color. A colored woman who entered the car appropriated to white ladies, was requested to leave it and take a seat in another car used for colored persons, and upon her refusal so to do was ejected by force from the car she first entered. *Held*,

CARRIERS.—*Continued.*

that she was improperly ejected. The provision referred to could not be construed to mean merely that the company should allow colored persons to ride in its cars; but that the former discrimination between white and colored passengers, in the use of the cars, should cease. *Washington, Alexandria, & Georgetown R. R. Co. v. Brown*, 413.

41. In an action against a railway company to recover damages for personal injuries, it appeared that a certain express company, by contract with the defendant, was entitled to use part of a baggage car on a passenger train of the defendant's railway, and the agents of the express company were allowed to ride on this car without paying fare. Other passengers were excluded from the car. The plaintiff, by arrangement with the express messenger and a local agent of the express company, went into this car for the purpose of learning the route, so that he might take the express messenger's place in his absence. He was introduced to the conductor by the express messenger, as an express messenger learning the route, and afterwards acted as such, assisting the regular express messenger along the route. The conductor allowed him to ride in the baggage car without paying fare. There was room in the passenger cars for him. He was not in fact an express messenger, nor was he in the employ of the express company in any manner whatever; the express messenger and the local agent not having any authority to employ him in any capacity. The baggage car was overturned and the plaintiff injured. *Held*, that the plaintiff was not a passenger, and the defendant was not liable for the injuries to him. *Union Pacific R. Co. v. Nichols*, 419.
42. A railway company, in consideration of a reduction of the usual rates of fares, may impose reasonable conditions upon passengers at the reduced rates; and if such conditions are not complied with, the company may demand the usual fare. *Goetz v. Hannibal & St. Joseph R. R. Co.*, 427.
43. The contract of a railway company to carry a passenger, when there is no agreement to the contrary, is entire in its character, and either party may insist on its being executed continuously, and not in fragments. If, by mutual consent, a new contract is made, allowing the passenger to stop a certain time at an intermediate point, the terms of such new contract, if accepted by the passenger, are binding upon him, and he must comply with its conditions. *Churchill v. Chicago & Alton R. R. Co.*, 430.
44. A passenger whose ticket entitled him to travel between two places on the defendant's railroad, procured from the conductor

CARRIERS—Continued.

a "lay-over" ticket, allowing him to remain at an intermediate station, and complete his trip from there at any time within thirty days. He left the train at that place, and, after the thirty days had expired, entered another of the defendant's cars at the same place, to complete his journey. Upon his fare being demanded he tendered the "lay-over" ticket, which the conductor refused; and on his failing to pay the fare, the conductor ejected him from the car. *Held*, that the defendant could properly prescribe, as a condition of granting such "lay-over" ticket, that it should be used within a certain time, and the passenger, having accepted the condition, was bound thereby. *Ib.*

45. A passenger by railroad upon a "drover's ticket," bought at less than half the regular rates, expressed on its face to be good only in his hands for one seat between certain specified points and dates, left the train at an intermediate point, and, getting on another train the next day, the conductor put him off, but afterwards allowed him to proceed. He was put off by another conductor, who afterwards took charge of the train; he entered again, paid his fare to prevent being put off, and proceeded to the end of his journey.

Held, 1. That the face of the ticket did not import a right to stop off, and the passenger had no cause of action against the company for his ejection.

2. That one conductor allowing the passenger without right to ride on the train a part of the distance covered by his ticket, did not give him a right to be carried the whole distance. A purchaser of a railroad ticket must inform himself of the rules governing the transit and conduct of the trains; and the burden is not on the company to show that a passenger had notice of their reasonable rules in running trains.

3. "Good for one seat," meant a seat in the train on which the passenger entered to be carried; not by different trains or by broken stages.

4. This rule is subject to the exception that a passenger may resume his journey, where, by misfortune or accident, not his fault, it has been interrupted. *Dietrich v. Pennsylvania R. R. Co.*, 435.

46. The plaintiff had purchased from the defendant, a railroad company, a commutation ticket which entitled him to ride in defendant's cars between two places specified, during a year, upon the condition, among others, that the ticket should be shown to conductors when requested, or when required by the rules of the company; and at the time of purchasing the ticket

CARRIERS—Continued.

the plaintiff signed a receipt containing similar conditions. One of the company's rules in force during the year required commuters to show their tickets to conductors when required, in the same manner as other passengers. During the year, while the plaintiff was riding in the defendant's cars, between the places specified, he was requested by the conductor to show his ticket. He had his ticket upon his person, but was unable to find it at the time, and so informed the conductor. The conductor knew that the plaintiff was a commuter, and that the time covered by his ticket had not expired, but acting in accordance with defendant's instructions, he demanded from the plaintiff his fare for the trip, and on his refusal to pay it ejected him from the train.

Held, 1. That the plaintiff was entitled to a reasonable time to find his ticket, and should have been allowed to ride as long as there was any reasonable expectation of finding it during the trip.

2. That under the circumstances the production of his ticket by the plaintiff was the merest formality; and in the absence of an express stipulation in the contract that the plaintiff should pay the fare of the passage unless the ticket should be produced, his failure to produce the ticket was not such a breach of the contract as to justify the defendant in rescinding it, and treating the plaintiff as a trespasser.

3. That if the defendant had a right to eject the plaintiff from the train, it had no right to do so elsewhere than at a regular station on the road; and any rule or regulation which allowed such an act to be done at a point between two stations, was, under the circumstances, unreasonable and therefore void.

Maples v. New York & New Haven R. R. Co., 445.

47. After a passenger upon a railway train had paid his fare to the conductor, the latter again demanded it, under the belief that it had not been paid, and notwithstanding the protestations of the passenger, corroborated by others near, that it had been paid, upon his refusal to pay a second time, ejected him from the train, by force and with opprobrious language. *Held*, that the conductor was liable for exemplary damages, in an action of trespass by the passenger. His honest belief that the passenger had not paid his fare, did not justify his acts and language. Before resorting to such extreme measures, a conductor should know that a passenger has not paid his fare. *Dalton v. Beers*, 450.

48. In estimating the damages in such a case, the expenses of the plaintiff in prosecuting his suit, exceeding his taxable costs, may be considered. *Id.*

CARRIERS—Continued.

49. The degree of care required of railroad companies to guard against injury to their passengers is, that they shall do all that human care, vigilance, and foresight can reasonably do, consistent with the mode of conveyance and the practical operation of the road. *Pittsburg, Cincinnati, & St. Louis R. Co. v. Thompson*, 454.
50. A company can not be required, for the sake of making travel upon its road absolutely free from peril, to incur a degree of expense which would render the operation of the road impracticable. *Ib.*
51. But the obligation of the company to provide the safest pattern of rail can not be made to depend merely upon whether a change of rail could be made without any additional expense. *Ib.*
52. The amount of the insurance paid by an accident insurance company to a passenger injured by a railway accident should not be deducted in estimating the damages to be recovered from the railway company by such passenger for the injury. The primary liability is on the railway company. *Ib.*
53. In an action to recover from a railway company damages for personal injuries to the plaintiff, while a passenger upon the defendant's train, it appeared that the plaintiff was confined to his bed by the injuries received a period of from two to three weeks, but did not, when quiet, suffer greatly from pain. After that time he began to walk about, though with great difficulty, but did not resume business in his office for three months. At the time of the trial, thirteen months after the accident, he was still feeling some pain and inconvenience. *Held*, if such temporary confinement and pain were the only consequences of the injury, the verdict (of \$5,000) would be regarded as excessive. But the proof being conflicting as to the extent of the injury, there being evidence from which the jury might find the plaintiff would never entirely recover, the verdict was not disturbed. *Ib.*
54. In an action against a railroad company for the recovery of damages for an injury to the person of a passenger, resulting from a single wrongful act of the defendant, evidence tending to show the character and extent of the injury and its probable results, as well as the probability of a return of the disease induced by the injury, in the ordinary course of nature, is admissible. *Filer v. New York Central R. R. Co.*, 460.
55. Successive actions can not be maintained for the recovery of damages, as they may accrue from time to time, caused by a single wrongful act, as would be the case for a continuous

CARRIERS—Continued.

wrong or a continued trespass. The party injured is entitled to recover, in a single action, compensation for all the damages, present or prospective, resulting from the injury. The limit in respect to future damages is, that they must be such as it is reasonably certain will inevitably and necessarily result from the injury. *Ib.*

56. Hence, in such a case, questions addressed to a physician, asking him to state, from his experience and medical knowledge, the probability of a recurrence of inflammation of an injured muscle, and the probable future condition of the general health of the person injured, are competent. *Ib.*
57. The plaintiff, a female passenger upon the defendant's train, had purchased a ticket and taken passage for a station at which the train was advertised to stop. On approaching the station the name of the place was called, and the speed of the train greatly reduced, but it did not stop. The defendant's brakeman directed the plaintiff to get off, he saying that the cars would not stop. Another passenger alighted safely, and the plaintiff attempted to follow, but her dress caught in the steps, and she was thrown down and injured. *Held*, that leaving the cars, under the circumstances, was not, as a matter of law, negligence contributing to the injury, but the question was proper for the jury. *Hiler v. New York Central R. R. Co.*, 466.
58. The question of concurrent negligence is to be determined by the particular circumstances of each case, and is, ordinarily, a question for the jury. And the defendant having involved the plaintiff in the attempt to get off the cars while in motion, and compelled her to choose instantly between doing so and being carried beyond her destination, she ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong. *Ib.*
59. The plaintiff, having purchased a ticket for passage upon defendant's railroad, attempted to get upon the train while it was slowly passing the station. The platform being crowded with passengers, he could only get on the lower step, from which he was thrown by a jerk of the cars; but he continued holding on and running beside the train, endeavoring to recover his place, the speed of the train increasing, until he struck against a platform near the track and was injured. *Held*, that his own act so contributed to the injury that a nonsuit in an action by him for the resulting damages was proper. And his negligence was not excused by the fact that some one on the train called out the name of the station, and that others were getting upon the train while in motion, and that the plaintiff and others had previously

CARRIERS — *Continued.*

got on and off trains while in motion at the same station. *Phillips v. Rensselaer & Saratoga R. R. Co.*, 477.

60. The mere inadvertent protrusion of the arm of a passenger from the window of a railway car is not, as matter of law, such negligence on his part as will defeat his action for damages for an injury which could not have happened but for such act of his. The question whether such inadvertence is culpable under the circumstances of the particular case, should be submitted to the jury. *Barton v. St. Louis & Iron Mountain R. R. Co.*, 482.
61. The fact that a passenger upon a street railway voluntarily places himself upon the front platform of the car, when there is room for him inside the car, does not, as a matter of law, absolve the railway company from liability for injuries received by such passenger in getting off the front platform. Contributive negligence can not be presumed from that circumstance. *Burns v. Bellefontaine R. Co. of St. Louis*, 490.
62. In an action to recover from a railway company damages for a personal injury, the plaintiff need not allege and affirmatively establish that he was free from negligence contributing to the injury. Negligence on the part of the plaintiff is a mere defense, to be set up by the defendant and shown like any other defense; and the plaintiff should not be compelled to aver and prove negatives in such cases. *Thompson v. North Missouri R. R. Co.* 492.
63. A railroad company carrying passengers for hire can not lawfully stipulate for exemption from responsibility for the negligence of itself or servants in respect to such carriage. This rule applies both to common carriers of goods and common carriers of passengers, but with especial force to the latter. *New York Central R. R. Co. v. Lockwood*, 495.
64. A railroad company does not, by entering into a special contract with a party for carrying his goods or person, drop its character as common carrier, and become an ordinary bailee for hire. *Ib.*
65. Carefulness and fidelity are *essential* duties of the employment of a common carrier; and they are as essential to the public security in his servants as in himself. *Ib.*
66. A drover, traveling on a stock train to look after his cattle, upon a pass entitling him to travel free, his passage being one of the terms of the contract for carrying his cattle, is a passenger for hire; and the railway company is liable to him for any injuries to his person caused by the negligence of itself or its servants, although he has agreed to take all risk of such injuries, and although his pass declares that the acceptance of it will be

CARRIERS—Continued.

considered a waiver of all claims for damages or injuries received on the train. *Ib.*

67. A contract for the transportation of sheep by railroad provided that the owner "should go or send some person or persons in the same train with the stock to take charge of the same, who should be carried free of charge, and who should take all the risks of personal injury from whatever cause, whether of negligence of the railroad company, its agents, or otherwise." He also received a pass which provided that its acceptance should be considered "a waiver of all claims against the company for personal injury received when on the above train." After the sheep were loaded, and the train was about starting, the owner, intending himself to go with the train, while passing the tender, was struck and injured by a stick of wood thrown therefrom by the engineer. In an action by him to recover damages from the railroad company, —*Held*, that under the contract the company was exempt from liability. To bring the plaintiff within the stipulation, it was not necessary that he should have been actually riding on the train at the time of his injury. *Poucher v. New York Central R. R. Co.*, 525.
68. Wearing apparel and personal ornaments, the paraphernalia of a married woman, given to her by her husband, are, under the statutes of New York in reference to the property of married women, her separate property; and an action against a railway company to recover damages for their loss or destruction, is properly brought in her name. *Rawson v. Pennsylvania R. R. Co.*, 528.
69. Matter printed upon the face of a railroad ticket, stating the terms upon which passengers' baggage will be carried by the railway company, is within the rule that a common carrier can not limit his liability by notice, but only by express contract. The ticket does not, generally, contain any contract, and is a mere token or voucher. *Ib.*
70. Although, if the attention of a passenger is called to such a notice when his ticket is purchased, or if it is shown that he knows of the notice at the time, the law may presume, in the absence of objection, that he assented to its terms; his rights are not affected by his reading such notice after he has purchased his ticket and entered on his journey. *Ib.*

CATTLE.

As to the construction of special agreements for transportation of cattle, see **CARRIERS**, 22, 63–67.

CHANCERY

See **EQUITY**.

CHARTERS.

As to construction of provisions of charters, see LANDS, 3; MUNICIPAL CORPORATIONS, 5, 7; TAXES, 6-16.

As to statutes impairing contract obligations in charters, see TAXES, 6-14.

CONNECTING LINES.

As to liability for injury to or loss of goods received to be forwarded by connecting lines, see CARRIERS, 25-31.

CONSIGNOR AND CONSIGNEE.

As to which can maintain an action against the carrier for goods lost, see CARRIERS, 2, 13, 14.

CONSOLIDATION.

Where two railroad companies are consolidated the presumption is, that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. *Tomlinson v. Branch*, 207.

CONSTITUTIONAL LAW.

As to construction of constitutional provisions, see MUNICIPAL CORPORATIONS, 7; STATUTES; TAXES, 1, 2.

CONTRACTS.

1. A certain railroad company, at great expense, graded a city street of width sufficient for two railroad tracks, upon the assurance from the authorities of the city that, should a certain other railroad company desire also to use the street, the city would require the latter company to pay to the former half the expense of grading. The first company having laid its track so as to leave one-half the space, the city granted to the other the right to use the street, provided the latter paid half the said expense to the former. *Held*, that a court of equity would restrain the city from changing the conditions of its grant, and directing the money to be paid into the city treasury, and would restrain such other company from paying the money to the city. *Southwestern R. R. Co. v. Screven*, 43.

2. In an action against a railroad company, upon a promise by the company to pay for goods furnished by the plaintiff to a sub-contractor engaged in constructing the road, an answer setting up merely that the railroad company was not indebted to such sub-contractor, does not state facts sufficient to constitute a defense. *Chicago, Cincinnati, & Louisville R. R. Co. v. West*, 239.

CONTRACTS—Continued.

3. The president and treasurer, or other managing officers of a railroad company, have power, without special authority from the board of directors, to employ attorneys to defend suits brought against the company. *Turner v. Chillicothe & Des Moines R. R. Co.*, 248.

4. To render a contract, alleged to have been made on behalf of a railroad company by its general superintendent, admissible in evidence against the company, the fact that he was such officer, and his authority to make such contract must be shown. *Chapman v. Chicago & Northwestern R. Co.*, 551.

As to when acceptance of contract without objection constitutes assent to its terms, see CARRIERS, 20.

As to special contracts limiting liability of carrier, see CARRIERS, 10, 20-31, 42, 63-70; limiting liability for negligence, see CARRIERS, 23, 24, 63-67; as to time and mode of carriage of passengers, see CARRIERS, 42-46.

See also BILLS OF EXCHANGE; BILLS OF LADING; DEEDS.

COUNTIES.

As to the power of counties to aid railroads, see MUNICIPAL CORPORATIONS, 2-8.

CUSTOM.

As to power of carrier to establish custom of delivery of goods, see CARRIERS, 11.

DAMAGES.

As to damages for private property taken for railroad purposes, see LANDS, 10, 12-14, 17, 19-26, 28-31.

For injury to or loss of goods carried by railroad, see CARRIERS, 2-39.

For injuries from explosion of explosive articles in course of transportation, see CARRIERS, 32-36.

For injuries to passengers, see CARRIERS, 47, 52-67; to their baggage, see CARRIERS, 68-70.

For injuries arising from negligence, see NEGLIGENCE.

DEEDS.

1. A voluntary conveyance of land to a railroad company may pass all the title of the grantor, although a court of equity would not compel performance of an executory contract to convey the land. *Land v. Coffman*, 1.

2. Where the charter of a railway company authorizes the company to "take, hold, use, possess, and enjoy lands, and the same to sell and dispose of at pleasure," although this power should be

DEEDS—Continued.

held subordinate to the general objects of the corporation, yet a conveyance by the company of lands purchased by it, and not necessary to its use, will pass title. *Whitehead v. Vineyard*, 7.

DEFENSES.

As to defenses in actions for damages for delay in transporting goods, see **CARRIERS**, 3.

For damages for injury to the person, see **CARRIERS**, 62.

For goods furnished to sub-contractor, see **CONTRACTS**, 2.

As to when contributory negligence is a defense, see **NEGLIGENCE**, 1-8.

DELIVERY.

As to delivery of goods by carrier to consignee, see **CARRIERS**, 6-19.

As to delivery of goods to connecting carriers, see **CARRIERS**, 27-31.

DIRECTORS.

See **OFFICERS; PROCESS**, 3.

DISCRIMINATIONS.

As to right of carriers to make discriminations between passengers, see **CARRIERS**, 40.

DRAFTS.

See **BILLS OF EXCHANGE**.

ELEVATORS.

As to delivery of grain consigned to elevators, see **CARRIERS**, 6-12.

EMINENT DOMAIN.

As to the extent of the right of eminent domain, and its delegation to railway companies, see **LANDS**, 11, 15, 28; **TAXES**, 2-8.

EQUITY.

1. A certain railroad company, at great expense, graded a city street of width sufficient for two railroad tracks, upon the assurance from the authorities of the city that, should a certain other railroad company desire also to use the street, the city would require the latter company to pay to the former half the expense of grading. The first company having laid its track so as to leave one-half the space, the city granted to the other the right to use the street, provided the latter paid half the said expense to the former. *Held*, that a court of equity would restrain the city from changing the conditions of its grant, and directing the money to be paid into the city treasury, and would

EQUITY—Continued.

restrain such other company from paying the money to the city. *Southwestern R. R. Co. v. Screven*, 48.

2. Where several actions for damages are brought by the owners of property abutting on a city street, against a number of railroad companies occupying the street with their tracks, equity may take jurisdiction by bill in the nature of a bill of peace, and bring in all the parties, plaintiffs and defendants, and adjust their equities and several rights by one decree. The inquiry should cover not only past but future damages, so as to stop all further litigation about the same subject-matter, and operate as a complete investiture of the legal right in the railroad companies free from further claim of damages. *South Carolina R. R. Co. v. Steiner*, 86.

As to grounds of injunction, see **CONTRACTS**, 1; **LANDS**, 8, 9; **MUNICIPAL CORPORATIONS**, 4, 5.

ESTOPPEL.

In an action to recover the amount of an assessment upon the property of a street railway company, of part of the expense of paving the street in which its track is laid, where the company has suffered the city to make the improvement and incur the expense, with full knowledge of the proceedings, and without objection, it is estopped from setting up the claim that its charter required it to pave the road covered by the track at its own expense. *City of New Haven v. Fairhaven & Westville R. R. Co.*, 280.

EVIDENCE.

1. A draft or order drawn by one officer of a railroad company upon another and accepted by the latter, may be regarded as the promissory note of the company. But evidence explaining the circumstances under which such a draft was accepted and delivered, is admissible in an action against the company for goods sold and delivered to a contractor, by direction of the company, there being an averment in the complaint that the draft was not delivered or received as payment. Such evidence does not contradict the draft. *Chicago, Cincinnati, & Louisville R. R. Co. v. West*, 239.
2. A witness on the trial of an action against a railway company, to recover penalties for numerous omissions to give the signals required by law, may use, to refresh his memory, a copy of an original memorandum of such omissions. That he uses the copy instead of the original, is an objection which goes to the credit, but not to the competency of his testimony. But before the witness can be permitted to refresh his memory from the

EVIDENCE.—Continued.

copy, he must be clear and explicit in his evidence that the copy is truly transcribed from the original, and that the original was correctly made, and was true when it was made. *Chicago & Alton R. R. Co. v. Adler*, 278.

3. In an action to recover damages for the destruction of property by fire communicated from a locomotive, admissions made by a defendant as to the cause of the fire may be received in evidence, although they were made upon information derived from others, and not upon facts within the knowledge of the party himself. *Chapman v. Chicago & Northwestern R. R. Co.*, 551.
4. To render a contract alleged to have been made on behalf of a railroad company by its general superintendent, admissible in evidence against the company, the fact that he was such officer, and his authority to make such contract must be shown. *Id.*
5. In an action to recover damages for the destruction of the plaintiff's buildings by fire communicated to them from the defendant's locomotive, the admission of evidence of the direction of the wind and state of the weather at the time at a place five miles distant is not erroneous, where it does not appear to have misled the jury. *Pierce v. Worcester & Nashua R. R. Co.*, 557.

As to what evidence is admissible in actions for injuries to the person, see **CARRIERS**, 54, 56.

In proceedings for the assessment of damages from the construction of a railroad, see **LANDS**, 18-22.

FENCES.

Where a statute authorizing the taking of land for the construction of a railway, requires the commissioners appointed to assess damages and benefits, to award as compensation the excess of the value of the land taken and the damages to that not taken over the benefits to the land not taken, including in the damages to land not taken the cost of necessary fencing, it is not a substantial error to assess the cost of fencing separately from the damages to the land not taken. Nor is it a substantial error to state the amount of the excess of damages to land not taken over the benefits thereto, without stating separately the amount of such damages and benefits. *California Pacific R. R. Co. v. Frisbie*, 62.

FIRES.

As to liability for injury to property by fire communicated from locomotive, see **NEGLIGENCE**, 13-18.

FREIGHT.

That freight must be paid or tendered before suit against carrier for non-delivery of goods, see PLEADING, 8.

HIGHWAYS.

1. The eminent domain of the State extends to streets and squares in a city dedicated to the public use; and the legislature may grant to a corporation the right to construct and operate a street railway through them without the consent of the authorities of the city. *Savannah & Thunderbolt R. R. Co. v. City of Savannah*, 36.
2. A municipal corporation has no property in such streets and squares as will entitle it to pecuniary compensation for the additional servitude placed upon them. Nor can the corporate authorities maintain a suit for the benefit of residents along such streets and squares, to restrain the construction of the railway. *Ib.*
3. Where a railroad company has procured the appropriation of a public street for its track, and damages therefor have been awarded and paid to the owners of land adjoining the street, they are entitled to further compensation for the damages resulting from the laying of another track in the street by a different railroad company. *Southern Pacific R. R. Co. v. Reed*, 46.
4. The fact that the authorities of the city have granted to a railway company the right to lay its track in a public street does not preclude the owners of land adjoining the street from recovering compensation for damages from the construction of the railway in such street. *Ib.*
5. Where the title in fee to the public streets in a city is in the corporation, and not in the owners of the land abutting upon the streets, such owners have an easement in the street in common with the whole people to pass and repass, and also to have free access to their premises; but the mere inconvenience of such access occasioned by the lawful use of the street is not the subject of an action. *Kellinger v. Forty-second Street & Grand Street R. R. Co.*, 77.
6. Hence, an action can not be maintained against a street railroad company merely on the ground that the defendant has laid its track in the street in front of the plaintiff's premises, so near the sidewalk that there is not sufficient space left for a carriage to stand, and that thereby the plaintiff and his family are incommoded in leaving and returning to his residence, and the rental value of the premises diminished; where it is not alleged that the plaintiff owns the fee of such street, nor that the defendant's track was unnecessarily or negligently or willfully laid

HIGHWAYS—Continued.

so near the sidewalk as to impair the use of his premises and depreciate their rental value. *Ib.*

7. The grant by municipal authorities of the use of a city street, the fee of which is in the state, for a railroad operated by steam, although ratified by the legislature, does not preclude suits for damages against the railroad company by the owners of land abutting on such street. *South Carolina R. R. Co. v. Steiner*, 86.
8. Where a penalty is imposed by statute for the failure of a railway company to give certain signals before its train crosses a public highway, the plaintiff in an action to recover such penalties must allege and prove that a highway existed at the point where the failure to give the proper signals is alleged to have occurred. *Chicago & Alton R. R. Co. v. Adler*, 278.
9. But evidence that there was at such a point a road used by the public, and recognized and repaired, when necessary, by the highway officers, is *prima facie* evidence of the existence of a highway. *Ib.*

INJUNCTION.

As to what are sufficient grounds for injunction, see **CONTRACTS**, 1; **LANDS**, 8, 9; **MUNICIPAL CORPORATIONS**, 4, 5.

INSURANCE.

1. An insurer of goods which are totally destroyed by an accidental fire while in the possession of a railway as common carrier, after he has paid the loss to the owner of the goods, may recover the amount from the railway company, by suit in the name of the owner. *Hall v. Nashville & Chattanooga R. R. Co.*, 409.
2. This right of the insurer rests upon the doctrine of subrogation, which applies to cases of insurance against fire on land, as well as to cases of marine insurance. *Ib.*
3. To sustain such an action by an insurer, it is not necessary to show any positive wrongful act by the railway company. *Ib.*
4. The amount of the insurance paid by an accident insurance company to a passenger injured by a railway accident should not be deducted in estimating the damages to be recovered from the railway company by such passenger for the injury. The primary liability is on the railway company. *Pittsburg, Cincinnati, & St. Louis R. Co. v. Thompson*, 454.

JURISDICTION.

1. Upon construing together the statutes of Missouri, relative to the jurisdiction of justices of the peace over railroad corpora-

JURISDICTION—Continued.

tions,—*Held*, that a justice of the peace has jurisdiction of an action against a railroad company on a contract of affreight to the extent of ninety dollars. *Williams v. North Missouri R. R. Co.*, 258.

2. An action against a railroad company, incorporated under the laws of another state, can not be sustained in Missouri, unless such company has its chief office or place of business within the latter state. *Middough v. St. Joseph & Denver City R. R. Co.*, 261.

That the record of proceedings to take private property for railway purposes must show jurisdictional facts, see LANDS, 6-7.

JURY.

In an action against a railway company, to recover penalties imposed by statute for neglecting to give signals prescribed, a jurymen who, being asked on his examination which way he would incline to find if the evidence were evenly balanced, answers that he would lean against the defendant, is incompetent. *Chicago & Alton R. R. Co. v. Adler*, 278.

LANDS.

1. A railway company which has been authorized by the legislature to receive and dispose of real estate at its pleasure, for the purpose of aiding in the construction of the road, and to pay debts contracted in its construction, as well as to hold lands for road-beds, depots, &c., can not be permitted to become a large landed proprietor for purposes not connected with its creation. But the question as to the amount of lands which it may properly receive can only be raised in a proceeding by the state against the company; it will not be determined in an action between private parties. *Land v. Coffman*, 1.
2. A voluntary conveyance of land to a railroad company may pass all the title of the grantor, although a court of equity would not compel performance of an executory contract to convey the land. *Ib.*
3. Where the charter of a railway company authorizes the company to "take, hold, use, possess, and enjoy lands, and the same to sell and dispose of at pleasure," although this power should be held subordinate to the general objects of the corporation, yet a conveyance by the company of lands purchased by it, and not necessary to its use, will pass title. *Whitehead v. Vineyard*, 7.
4. A lien upon the lands of a railway company in favor of the state, created by statute, may embrace lands acquired by the com-

LANDS—Continued.

pany after the creation of the lien, if such is the legislative intention. *Ib.*

5. Proceedings for the condemnation of land for railway purposes allowed by statute, being in derogation of common law and common right, must be strictly pursued in order to give validity; and unless the record affirmatively show that every essential pre-requisite of the statute conferring the authority has been complied with, the proceeding is void. *Ells v. Pacific Railroad*, 12.
6. Thus where the refusal of the owner to relinquish his land is made, by statute, a pre-requisite to proceedings for condemnation, such refusal is a jurisdictional fact; and if that fact is not shown affirmatively by the record, judgment of condemnation is void. *Ib.*
7. Where a statute authorizing the condemnation of land for railway purposes, requires that an offer be made to purchase the land from the owner before proceedings are taken for its condemnation, and also requires that the instrument of appropriation be filed, and a copy served on the owner of the land, the antecedent negotiation is not a jurisdictional fact which must appear on the face of the record in order to sustain a judgment of condemnation when questioned collaterally. Jurisdiction of the subject-matter is acquired by the filing of the instrument of appropriation, and of the person by the service of the copy; and the action of the court must be presumed to be right, and upon proof of the necessary facts, and can not be called in question in a collateral proceeding. *Ney v. Swinney*, 17.
8. Hence, an injunction restraining the building of a railway over land which has been condemned under such a statute, can not be sustained merely because no attempt to purchase from the owner was made prior to the proceedings for condemnation. *Ib.*
9. Where, in such a case, the land owner has appeared in the proceedings to appropriate his property, filed exceptions to the assessment of damages, and taken an appeal therefrom, he has chosen his remedy; and he can not, while the appeal is pending, seek another, by injunction or otherwise. *Ib.*
10. Where a railway company has entered upon and occupied lands of a private individual, and has constructed its road and erected buildings thereon, without having acquired the right to do so, either by grant from the owner or by proceedings for the condemnation of the land, and afterwards proceeds legally to condemn and appropriate the land, the compensation to be awarded to the owner should be the value of the property at the time such proceedings are taken; not the value at the time when the

LANDS—Continued.

- company, without right or legal authority, took possession of it. And the value of the buildings erected and improvements made by the company should be included. *Graham v. Connersville & Newcastle Junction R. R. Co.*, 28.
11. The eminent domain of the state extends to streets and squares in a city dedicated to the public use; and the legislature may grant to a corporation the right to construct and operate a street railway through them without the consent of the authorities of the city. *Savannah & Thunderbolt R. R. Co. v. City of Savannah*, 86.
 12. A municipal corporation has no property in such streets and squares as will entitle it to pecuniary compensation for the additional servitude placed upon them. Nor can the corporate authorities maintain a suit for the benefit of residents along such streets and squares, to restrain the construction of the railway. *Ib.*
 13. Where a railroad company has procured the appropriation of a public street for its track, and damages therefor have been awarded and paid to the owners of land adjoining the street, they are entitled to further compensation for the damages resulting from the laying of another track in the street by a different railroad company. *Southern Pacific R. R. Co. v. Reed*, 46.
 14. The fact that the authorities of the city have granted to a railway company the right to lay its track in a public street does not preclude the owners of land adjoining the street from recovering compensation for damages from the construction of the railway in such street. *Ib.*
 15. Congress has power to grant to a railroad company the right of way over public lands of the United States which are occupied by persons having the right to pre-empt such lands, but who have not perfected their right by the requisite proof and payment for the land. *Western Pacific R. R. Co. v. Kerr*, 50.
 16. The right of way granted by congress to the Central Pacific Railroad Company, by act of July 1, 1862, became perfect, as against such pre-emptioners, upon the filing of the plat of the location of the railroad in the proper land office. *Ib.*
 17. In the assessment of damages to property from the construction and use of a railway, the measure of damages is the actual injury resulting directly from the invasion of the property. Loss of custom of a mill after the building of the railroad should not be included. *Selma, Rome, & Dalton R. R. Co. v. Camp*, 58.
 18. Where proceedings for the assessment of damages for taking

LANDS—Continued.

land of a private owner for the construction of a railway are originated by the railway company against one as the owner of the land, he, being thus recognized by the company, will not be required to prove his title to the land at the trial. *Ib.*

19. In the assessment of damages to real property caused by the construction of a railway, the decrease in the rental value of the property, or the impossibility of procuring constant tenants, arising from the inconveniences to which such tenants are subjected by reason of the construction of the railroad, may properly be considered. *Pittsburg, Virginia, & Charleston R. Co. v. Rose*, 56.
20. In applying the rule that in such cases the measure of damages is the difference between the market value of the property before and after the construction of the railroad, the true test of the value of property is the opinion of witnesses in view of the location, productiveness, and the general selling price in the neighborhood. *Ib.*
21. In estimating the height of an embankment, the ties, with the ballasting and filling in between them, should be included as part of the embankment. *Ib.*
22. Improvements proposed to be made by the railway company, not connected with the completion of the road, are not to be considered in determining the compensation. *Ib.*
23. The fact that the owner of the property had built his house partly upon the public street does not preclude his recovering compensation for the part built on his own land. *Ib.*
24. Where a statute authorizing the taking of land for the construction of a railway requires the commissioners appointed to assess damages and benefits, to award as compensation the excess of the value of the land taken and the damages to that not taken over the benefits to the land not taken, including in the damages to land not taken the cost of necessary fencing, it is not a substantial error to assess the cost of fencing separately from the damages to the land not taken. Nor is it a substantial error to state the amount of the excess of damages to land not taken over the benefits thereto, without stating separately the amount of such damages and benefits. *California Pacific R. R. Co. v. Frisbie*, 62.
25. The right to compensation for damages caused by constructing a railway over land of a private owner is personal, and does not pass by a conveyance of the land. *McFadden v. Johnson*, 65.
26. Where proceedings have been taken by a railway company to acquire lands of a private individual for the purposes of its road, and the damages have been assessed and the commis-

LANDS—Continued.

sioners' report filed, but, before the payment of the compensation to the owner, an agent of the company enters upon and occupies the land without the consent of the owner, such act is a trespass, and the right of action of the land owner therefor is not waived by his subsequent acceptance of the amount awarded as compensation for the taking of the land. *Powers v. Hurmert*, 68.

27. A railroad company which had acquired the right of way through certain streets of a city, subsequently transferred its right to another company, which took up the rails outside the city for a distance of a mile, transferred them to a new track around the city, and contracted with the owner of the land taken for such new track to procure a release from the former company to him of the land from which the track had been removed. The portion of the track within the city remained connected at one end with the main track of the latter company, and was used as a switch or side track. *Held*, that this was not an abandonment of the right of the former company to maintain a track through the streets of the city. *City of Columbus v. Columbus & Shelby R. R. Co.*, 70.
28. The grant by the municipal authorities of the use of a city street, the fee of which is in the state, for a railroad operated by steam, although ratified by the legislature, does not preclude suits for damages against the railroad company by the owners of land abutting on such street. *South Carolina R. R. Co. v. Steiner*, 86.
29. The damages recoverable in such suits must be limited to actual damages, tangible and determinable. Apprehensions of the safety of children, the possibilities of sickness, losses in trade, or any fanciful or speculative disturbances should not be considered. But the actual depreciation of the value of property, not only from obstructions to access, but from noise, smoke, shaking of walls, and the like, which can be traced as effect to cause, may be inquired into. *Ib.*
30. Where several actions for damages are brought by the owners of property abutting on a city street, against a number of railroad companies occupying the street with their tracks, equity may take jurisdiction by bill in the nature of a bill of peace, and bring in all the parties, plaintiffs and defendants, and adjust their equities and several rights by one decree. The inquiry should cover not only past but future damages, so as to stop all further litigation about the same subject-matter, and operate as a complete investiture of the legal right in the railroad companies free from further claim of damages. *Ib.*

LANDS—Continued.

31. Where the law provides a special proceeding for the assessment of damages to the land of a private individual, resulting from the construction of a railway, his remedy at common law by action of trespass on the case to recover damages for the injury is taken away. *McIntire v. Western North Carolina R. R. Co.*, 99.

LIEN.

A lien upon the lands of a railway company in favor of the state, created by statute, may embrace lands acquired by the company after the creation of the lien, if such is the legislative intention. *Whitehead v. Vineyard*, 7.

MANDAMUS.

To compel a railway company to deliver to a particular elevator grain in bulk consigned thereto upon the line of its road, the writ of mandamus is proper, there being no other adequate remedy. *Chicago & Northwestern R. Co. v. People of the State of Illinois ex rel. Hempstead*, 296.

MARRIED WOMEN.

1. In an action by a married woman against a railroad company, to recover damages for personal injuries caused by the defendant's negligence, the plaintiff can not, under the laws of New York relating to married women and their separate property, recover consequential damages resulting from her inability to labor, unless she is carrying on a trade or business, or performing labor or services, upon her sole and separate account. Her services and earnings belong to her husband, and he may have an action for their loss. *Filer v. New York Central R. R. Co.*, 466.
2. Wearing apparel and personal ornaments, the paraphernalia of a married woman, given to her by her husband, are, under the statutes of New York in reference to the property of married women, her separate property; and an action against a railway company to recover damages for their loss or destruction, is properly brought in her name. *Rawson v. Pennsylvania R. R. Co.*, 528.

MASTER AND SERVANT.

1. A brakeman, while at his brake on the defendant's freight car, in passing a bridge was struck by the cross timbers and killed. He had passed the bridge daily, in the same employment, during the two or three previous weeks. He had repeatedly been warned of the danger of injury from this bridge; and just before reaching it, on this occasion, he was seen sitting

MASTER AND SERVANT—Continued.

upon his brake, facing the bridge. *Held*, that, under the circumstances, his own negligence contributed to the injury, and therefore the defendant was not liable for resulting damages. *Devitt v. Pacific R. R. Co.*, 533.

2. The deceased having also had knowledge of his exposure to danger in serving as brakeman upon a train having to pass bridges not high enough to permit him to pass under them while standing at full height upon a car, and having with such knowledge continued in the defendant's service until killed by coming in contact with one of such bridges,—*Held*, that the defendant was not liable for the resulting damages on the ground of negligence in the construction of the bridge. In such a case the servant himself assumes the risk, and it can not be charged upon the employer. *Ib.*

MUNICIPAL CORPORATIONS.

1. Aid to construction of a railroad, as a public use, may be extended by means of the power of eminent domain, or by subscription to capital stock, or donations made by cities and other political subdivisions of the state, under authority of the legislature. *Stockton & Visalia R. R. Co. v. Common Council of the City of Stockton*, 102.
2. Where bonds are issued by a county to raise funds for a subscription to the stock of a railway company, although the railway intended is not designated by name in the proceedings of the county court, yet if there is reasonable certainty in the ordering of the subscription, and the subscription is actually made to the railway authorized, the bonds issued are not, on that account, invalid. *Ranney v. Baeder*, 141.
3. Where, in order to pay a subscription by a county to the stock of a railway company, the county court levies a tax and appoints an agent to receive the money collected and to pay it over when ordered by the county court, the railway company has no lien upon the money collected and in the hands of the agent, but not ordered to be paid over; and the money may be recalled by the county at any time before payment to the company. *Henry County v. Allen*, 146.
4. Proceedings to restrain the officers of a county from issuing bonds or warrants of the county in payment of a subscription to the capital stock of a railroad company, and from levying or collecting any taxes for the purpose of paying such bonds or the coupons thereon, or such warrants, may be maintained by the state, through its proper officers, where such acts are in violation of the constitution and laws of the state. The writ

MUNICIPAL CORPORATIONS—Continued.

of quo warranto affords an ample remedy for misuse of its powers by a *private* corporation; but the power of the state to restrain *public* corporations from a violation of law will be sustained. *State of Missouri v. Saline County Court*, 149.

5. The original charter of a railroad company, granted by a state legislature, authorized it to construct a railroad by a designated route to a certain river, and also allowed "any county in which any part of the route of said railroad may be," to subscribe to the stock of the company. Subsequently a new state constitution was adopted, which provided that the legislature should not authorize "any county, city, or town to become a stockholder in or to loan its credit to any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election, assented thereto." After the taking effect of this constitutional provision, an act was passed as an amendment to the original charter, authorizing the extension of the road beyond its terminus at the river mentioned in the original charter, through counties not on the route designated in that charter. *Held*, that these counties were not authorized by the amended charter to subscribe to the stock of the railroad company, without submitting the question to vote, as provided in the constitution. No legislative act could give those counties a power prohibited by the constitution after its adoption, which they did not possess at the time it was adopted. *Ib.*
6. In an action for the cancellation of a subscription by a county to the stock of a railway company, and for the surrender and cancellation of bonds of the county issued in payment of such subscription, the railroad upon whose stock-books is the subscription, and the agent of the county who holds the bonds for negotiation, are proper parties. *State of Missouri v. Callaway County Court*, 172.
7. Where the charter of a railway company, granted by the state legislature, gives authority to the counties through which the route of the railway passes, and those adjoining and near thereto, to subscribe for stock of the railway company without first submitting the matter to a vote of the people of the county, the power of such counties to do so is not affected by a constitutional provision, subsequently adopted, prohibiting any county from becoming a stockholder in or loaning its credit to any company, &c., without the assent, by vote, of two-thirds of its people. *State of Missouri v. Sullivan County Court*, 178.
8. Proceedings to set aside an order of a county court making a

MUNICIPAL CORPORATIONS—Continued.

subscription to the stock of a railroad company, and to have the same declared null and void, and the bonds of the county issued to pay the subscription delivered up and canceled, may be maintained by any tax-payers on behalf of themselves and all other citizens and tax-payers similarly interested, upon sufficient grounds,—such as fraud,—if such acts will result in increased taxation. And the state is not a necessary party to such a proceeding. *Newmeyer v. Missouri & Mississippi R. R. Co.*, 187.

As to the construction and operation of a railway in the streets of a city, see HIGHWAYS, 5-7; LANDS, 11-14, 27-30; NEGLIGENCE, 9-12.

NEGLECT.

1. The plaintiff, a female passenger upon the defendant's train, had purchased a ticket and taken passage for a station at which the train was advertised to stop. On approaching the station the name of the place was called, and the speed of the train greatly reduced, but it did not stop. The defendant's brakeman directed the plaintiff to get off, he saying that the cars would not stop. Another passenger alighted safely, and the plaintiff attempted to follow, but her dress caught in the steps, and she was thrown down and injured. *Held*, that leaving the cars, under the circumstances, was not, as a matter of law, negligence contributing to the injury, but the question was proper for the jury. *Filer v. New York Central R. R. Co.*, 466.
2. The question of concurrent negligence is to be determined by the particular circumstances of each case, and is, ordinarily, a question for the jury. And the defendant, having involved the plaintiff in the attempt to get off the cars while in motion, and compelled her to choose instantly between doing so and being carried beyond her destination, she ought not to be held to the most rigid account for the exercise of the highest degree of caution as against one confessedly wrong. *Id.*
3. The plaintiff having purchased a ticket for passage upon defendant's railroad attempted to get upon the train while it was slowly passing the station. The platform being crowded with passengers, he could only get on the lower step, from which he was thrown by a jerk of the cars; but he continued holding on and running beside the train, endeavoring to recover his place, the speed of the train increasing, until he was struck against a platform near the track and was injured. *Held*, that his own act so contributed to the injury that a nonsuit in an

NEGLIGENCE--Continued.

action by him for the resulting damages was proper. And his negligence was not excused by the facts that some one on the train called out the name of the station, and that others were getting upon the train while in motion, and that the plaintiff and others had previously got on and off trains while in motion at the same station. *Phillips v. Rensselaer & Saratoga R. R. Co.*, 477.

4. The mere inadvertent protrusion of the arm of a passenger from the window of a railway car is not, as matter of law, such negligence on his part as will defeat his action for damages for an injury which could not have happened but for such act of his. The question whether such inadvertence is culpable under the circumstances of the particular case, should be submitted to the jury. *Barton v. St. Louis & Iron Mountain R. R. Co.*, 482.
5. The fact that a passenger upon a street railway voluntarily places himself upon the front platform of the car, when there is room for him inside the car, does not, as a matter of law, absolve the railway company from liability for injuries received by such passenger in getting off the front platform. Contributive negligence can not be presumed from that circumstance. *Burns v. Bellefontaine R. Co. of St. Louis*, 490.
6. In an action to recover from a railway company damages for a personal injury, the plaintiff need not allege and affirmatively establish that he was free from negligence contributing to the injury. Negligence on the part of the plaintiff is a mere defense to be set up by the defendant and shown like any other defense; and the plaintiff should not be compelled to aver and prove negatives in such cases. *Thompson v. North Missouri R. R. Co.*, 492.
7. A brakeman, while at his brake on the defendant's freight car, in passing a bridge was struck by the cross timbers and killed. He had passed the bridge daily, in the same employment, during the two or three previous weeks. He had repeatedly been warned of the danger of injury from this bridge; and just before reaching it, on this occasion, he was seen sitting upon his brake, facing the bridge. *Held*, that, under the circumstances, his own negligence contributed to the injury, and therefore the defendant was not liable for resulting damages. *Devitt v. Pacific R. R. Co.*, 533.
8. The deceased having also had knowledge of his exposure to danger in serving as brakeman upon a train having to pass bridges not high enough to permit him to pass under them while standing at full height upon a car, and having with such

NEGLIGENCE—Continued.

knowledge continued in the defendant's service until killed by coming in contact with one of such bridges,—*Held*, that the defendant could not be held liable for the resulting damages on the ground of negligence in the construction of the bridge. In such a case the servant himself assumes the risk, and it can not be charged upon the employer. *Ib.*

9. A railroad company that lays its tracks in a street or public highway is under obligation to lay them in a proper manner, and to keep them in repair; and if an injury occurs, by reason of a neglect in either of these respects, the company is liable for the resulting damage. *So held*, in an action for injury to a horse that, while being driven by his owner over a street railroad track, stepped into a hole, was thrown down, and fatally injured. *Worster v. Forty-second-street & Grand-street Ferry R. R. Co.*, 537.
10. Notice to the railroad company of a patent defect is not necessary to maintain such an action. An omission to know that such a defect existed, is *prima facie* negligence as much as an omission to repair after notice. *Ib.*
11. The presumption of negligence is complete when it appears that the defect existed and an injury was caused thereby. If circumstances exist, showing absence of negligence, they must be proved by the railroad company. *Ib.*
12. Where a public crossing of a railway track is obstructed by a train stopping there to unload the cars, so that passers are obliged to cross at other points, the railroad company is bound to use ordinary care and diligence to prevent injury to them. And where persons are in the habit, when the public crossing is so obstructed, of crossing at another place, the agents and servants of the company are bound to take notice of the fact, and use proper precautions. The company is liable for damages to a person injured by its negligence, at such a point on its track, although such person had no authority to cross the track at that place. *Brown v. Hannibal & St. Joseph R. R. Co.*, 540.
13. Sparks from a construction train on the defendant's railway set fire to combustibles on the track; but, although this was known to defendant's servants in charge of the train, they took no means to extinguish the fire or prevent its spread. *Held*, that this was negligence on the part of the defendant, which rendered it liable to the plaintiff for damages to his property, caused by spread of the fire. *Rolke v. Chicago & Northwestern R. Co.*, 548.
14. *It seems*, that had the train been a passenger train, instead of a

NEGLIGENCE—Continued.

- gravel train engaged in the repair of the road, a failure to stop the train and leave men to extinguish the fire might not have been negligence. *Ib.*
15. In an action to recover damages for the destruction of property by fire communicated from a locomotive, admissions made by a defendant as to the cause of the fire may be received in evidence, although they were made upon information derived from others, and not upon facts within the knowledge of the party himself. *Chapman v. Chicago & Northwestern R. Co.*, 551.
 16. The damages recovered in an action against a railway company for the negligent destruction of the plaintiff's property, by fire communicated from the defendant's locomotive, may properly include interest on the value of the property destroyed, from the commencement of the action. *Ib.*
 17. The fact that in estimating the compensation to an owner of land taken for the construction of a railway, damages from the exposure of his buildings to fire are included in the amount awarded, will not defeat the right of a subsequent grantee of the buildings, who was not a party to the proceedings, to recover damages for the destruction of such buildings by fire communicated to them by the negligence of the railway company. *So held*, in an action brought under *Mass. Gen. Stat.*, ch. 63, § 101, which gives a right of action for such a loss, whenever shown to have been caused by passing engines. *Pierce v. Worcester & Nashua R. R. Co.*, 557.
 18. In an action to recover damages for the destruction of the plaintiff's buildings by fire communicated to them from the defendant's locomotive, the admission of evidence of the direction of the wind and state of the weather at the time at a place five miles distant is not erroneous, where it does not appear to have misled the jury. *Ib.*

As to the liability of carriers for negligence, see **CARRIERS**, 17, 21-24.

NOTICE.

As to the obligation to give notice to the consignee of the arrival of goods, see **CARRIERS**, 16, 17.

Notice to the carrier of the nature of goods transported, see **CARRIERS**, 32-36.

As to limiting liability of carriers by notice, see **CARRIERS**, 69, 70.

OFFICERS.

The president and treasurer or other managing officers of a railroad company have power, without special authority from the board

OFFICERS—Continued.

of directors, to employ attorneys to defend suits brought against the company. *Turner v. Chillicothe & Des Moines City R. R. Co.*, 248.

PARTIES.

1. In an action for the cancellation of a subscription by a county to the stock of a railway company, and for the surrender and cancellation of bonds of the county issued in payment of such subscription, the railroad upon whose stock-books is the subscription, and the agent of the county who holds the bonds for negotiation, are proper parties. *State of Missouri v. Callaway County Court*, 172.
2. Proceedings to set aside an order of a county court making a subscription to the stock of a railroad company, and to have the same declared null and void, and the bonds of the county issued to pay the subscription delivered up and canceled, may be maintained by any tax-payers on behalf of themselves and all other citizens and tax-payers similarly interested, upon sufficient grounds,—such as fraud,—if such acts will result in increased taxation. And the state is not a necessary party to such a proceeding. *Newmeyer v. Missouri & Mississippi R. R. Co.*, 187.

PASSENGERS.

- As to who are passengers, see CARRIERS, 41, 66, 67.
- As to special agreements in regard to fare, see CARRIERS, 42-46.
- As to the right of carriers to make discriminations in regard to passengers, see CARRIERS, 40.
- As to damages for injuries to passengers, see CARRIERS, 41, 47-67.

PENALTIES.

1. An action against a railroad company to recover a penalty, under the statute of New York to prevent extortion by railroad companies, *Laws of 1857*, ch. 185, is not "an action arising on contract, for the recovery of money only," within the meaning of section 129 of the New York Code of Procedure, prescribing the form of the summons; and the summons in such an action should, therefore, not contain a notice that on failure of the defendant to answer, the plaintiff will take judgment for a specified sum, but a notice that the plaintiff will apply to the court for the relief demanded. *McCoun v. New York Central & Hudson River R. R. Co.*, 269.
2. But although in such an action the notice contained in the summons is in the former instead of the latter form, an order deny-

PENALTIES—Continued.

ing a motion to set aside a summons and complaint for such defect in the summons, does not affect a substantial right, and is, therefore, not appealable to the court of appeals of New York. *So held*, where the summons and complaint were served together upon the defendant. *Ib.*

3. In an action against a railway company, to recover penalties imposed by statute for neglecting to give signals prescribed, a jurymen who, being asked on his examination which way he would incline to find if the evidence were evenly balanced, answers that he would lean against the defendant, is incompetent. *Chicago & Alton R. R. Co. v. Adler*, 278.
4. A witness on the trial of an action against a railway company to recover penalties for numerous omissions to give the signals required by law, may use, to refresh his memory, a copy of an original memorandum of such omissions. That he uses the copy instead of the original, is an objection which goes to the credit but not to the competency of his testimony. But before the witness can be permitted to refresh his memory from the copy, he must be clear and explicit in his evidence that the copy is truly transcribed from the original, and that the original was correctly made, and was true when it was made. *Ib.*
5. Where a penalty is imposed by statute for the failure of a railway company to give certain signals before its train crosses a public highway, the plaintiff in an action to recover such penalty must allege and prove that a highway existed at the point where the failure to give the proper signals is alleged to have occurred. *Ib.*
6. But evidence that there was at such a point a road used by the public, and recognized and repaired, when necessary, by the highway officers, is *prima facie* evidence of the existence of a highway. *Ib.*
7. The declaration in an action against a railway company, to recover penalties for its omissions to give signals of the approach of its trains, need not set forth the particular trains failing to give the signals. Neither are the numbers or descriptions of the engines of such trains material. *Ib.*
8. Where a statute imposing a penalty of fifty dollars upon every railway company, for each failure to give certain signals of the approach of its train to a highway crossing (*Ill. Act. Nov. 5, 1849, § 138*), is amended by an act which provides that in pending suits the penalty recoverable for each offense shall be not exceeding one hundred dollars, instead of fifty dollars, (*Ill. Act. Feb. 27, 1869*), although it may be the legislature had not

PENALTIES—Continued.

power to increase the penalty after the omission had occurred, yet, as to pending suits, the provision operates as a repeal of the former penalty, and allows it to be fixed at any amount not more than fifty dollars. *Ib.* ; *Wilson v. Ohio & Mississippi R. R. Co.*, 285.

9. The prosecutor in a *qui tam* action for such a penalty has no vested right in the penalty until he has reduced his claim to a judgment. *Ib.* ; *Ib.*
10. A higher penalty than fifty dollars can not be imposed for offenses committed before the passage of the amendatory act. Such a construction of that act would make it an *ex post facto* law. *Wilson v. Ohio & Mississippi R. R. Co.*, 285.

PLEADING.

1. In an action against a railroad company, upon a promise by the company to pay for goods furnished by the plaintiff to a sub-contractor engaged in constructing the road, an answer setting up merely that the railroad company was not indebted to such sub-contractor, does not state facts sufficient to constitute a defense. *Chicago, Cincinnati, & Louisville R. R. Co. v. West*, 239.
2. The declaration in an action against a railway company, to recover penalties for its omissions to give signals of the approach of its trains, need not set forth the particular trains failing to give the signals. Neither are the numbers or descriptions of the engines of such trains material. *Chicago & Alton R. R. Co. v. Adler*, 278.
3. In an action against a railway company, for a failure to deliver goods received by it for transportation as a common carrier, the complaint must show that, after the receipt of the goods by the defendant, and before the demand for their delivery was made, the goods had actually been transported to their destination, or that a reasonable time had elapsed for their transportation, in due course, or that the defendant had converted them to its own use; and the complaint must also show that the defendant's reasonable freight and charges have been paid or tendered, or some sufficient reason or excuse for not doing so must be alleged. *Jeffersonville, Madison, & Indianapolis R. R. Co. v. Gent*, 335.

That in actions for injury to the person the plaintiff need not allege freedom from negligence on his part, see CARRIERS, 62.

That in actions for penalties for failing to signal before crossing a highway, the existence of the highway must be alleged, see PENALTIES, 5, 6.

PRESUMPTIONS.

As to presumptions of negligence, see NEGLIGENCE, 11.

PROCESS.

1. In construing a statute allowing suits against corporations to be commenced in any county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business,—such as 1 *Wagn. (Mo.) Stat.* 394, §§ 26, 28,—a railroad corporation should be considered a resident of any county through which its line of road passes, and in which it has an agent upon whom process can be served. *Slavens v. South Pacific R. R. Co.*, 262.
2. A suit against a railway company, for a penalty imposed by statute for failing to give the signals required, may be commenced by service of the process upon a station agent of the company, if that mode of service is proper in ordinary cases, although the statute provides that such suits “may be commenced by serving the summons on any director of such company.” The word “may” is permissive and additional as to the common mode of service, not mandatory or exclusive of other methods. *State of Missouri v. Hannibal & St. Joseph R. R. Co.*, 266.
3. In an action against a railway company, service of process upon one formerly a director of the company, where service upon a director is allowed by law, is sufficient, in the absence of proof that such person is no longer a director. *Washington, Alexandria, & Georgetown R. R. Co. v. Brown*, 413.

As to form of summons, see PENALTIES, 1, 2.

PROMISSORY NOTES.

See BILLS OF EXCHANGE, 2.

QUESTIONS OF LAW AND OF FACT.

As to the distinction between questions of law and questions of fact, see CARRIERS, 18, 60.

REASONABLE TIME.

As to what is a reasonable time to remove goods ready for delivery by carrier, see CARRIERS, 18.

RECEIPTS.

As to the effect of carriers' receipts for goods, see CARRIERS, 1, 13, 20.

RECEIVERS.

The appointment of a receiver of the property of a railway com-

RECEIVERS—Continued.

pany does not relieve the corporation from the duties and obligations imposed by its charter, or by the general laws of the state, unless the possession of the receiver is exclusive, and the servants of the road wholly employed and controlled by him. Where the road is run on the joint account of lessees and the receiver, and the servants employed and controlled by them jointly, both are alike responsible for any failure in the performance of the duties imposed. *Washington, Alexandria, & Georgetown R. R. Co. v. Brown*, 413.

SERVICE.

As to service of process, see **PROCESS**.

STATUTES.

The power of the judiciary to declare an enactment of the legislature of a state unconstitutional should never be exerted except when the conflict between the statute and the constitution is palpable and incapable of reconciliation. An alleged limitation upon the powers of a state legislature must appear either by the words employed for that purpose in the constitution, or by an implication necessarily flowing from those words, and without which the words themselves can not have their natural force and fair import. *Stockton & Visalia R. R. Co. v. Common Council of the City of Stockton*, 102.

As to statutes regulating liability of carriers, see **CARRIERS**, 26.

Statutes to prevent unjust discriminations by carriers, see **CARRIERS**, 40.

Statutes authorizing consolidation of railway companies, see **CONSOLIDATION**.

Statutes authorizing railway companies to take, hold, and convey real estate, see **LANDS**, 1-4.

Statutes authorizing municipalities to aid railways, see **MUNICIPAL CORPORATIONS**.

Statutes taxing railroads, see **TAXES**.

Statutes imposing penalties, see **PENALTIES**, 8, 9.

Statutes impairing the obligation of contracts, see **TAXES**, 6-14.

STREET RAILROADS.

As to compensation to owners of land adjoining street occupied by railroads, see **LANDS**.

As to liability for injuries to passengers on street railroad, see **CARRIERS**, 61.

As to taxation of street railroads, see **TAXES**, 17-21.

SUBROGATION.

As to subrogation of the insurer of goods destroyed to the right of the owner, see CARRIERS, 37-39.

TAXES.

1. The constitution of California places no limitation upon the power of the legislature to impose taxes. The principle upon which taxation is to be imposed is pointed out, but the extent to which it may be carried is left unlimited, except by legislative discretion. *Stockton & Visalia R. R. Co. v. Common Council of the City of Stockton*, 102.
2. Where the "public use" for which a state constitution allows private property to be taken is not defined by the constitution, its definition must be left, in large measure, to legislative determination; and the resolve of a legislative body by which a tax is imposed, or private property taken, is, necessarily, such a determination. Hence, when the legislature has determined that a particular railroad in fact concerns the public interest, its determination in that respect can not be reviewed by the courts. *Ib.*
3. There is no difference between the public use which will authorize the taking of private property in aid of a railroad, and the public use which will support the laying of a tax in aid of the road. Wherever the power of eminent domain may be exercised in aid of a railroad, taxation may be resorted to for the same purpose. *Ib.*
4. Aid to construction of a railroad, as a public use, may be extended by means of the power of eminent domain, or by subscription to capital stock, or donations made by cities and other political subdivisions of the state, under authority of the legislature. *Ib.*
5. The fact that a railroad is owned and operated by a private corporation, and for private profit, does not prevent its being also of public use. *Ib.*
6. Where the charter of a railroad company exempts from taxation the property of the company and the shares therein, a subsequent act imposing a tax upon the franchise, rolling stock, and real property of the company is void, as it impairs the obligation of the contract in the charter. *Wilmington & Weldon R. R. Co. v. Reid*, 195.
7. In the application of such an exemption, the corporate franchise can not be distinguished from other property of the company, and is equally within the protection of the contract. *Ib.*
8. Where the charter of a railroad company exempts from taxa-

TAXES—Continued.

- tion all the property of the company for a certain term of years, and afterwards until the annual profits exceed a certain percentage, subsequent legislation imposing a tax, although the annual profits have not reached the percentage specified, is void, as impairing the obligation of a contract. *Raleigh & Gaston R. R. Co. v. Reid*, 199.
9. At the time of the incorporation of a railroad company by the state of South Carolina, a general law of that state was in force, providing that any corporate charter subsequently granted, or any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless excepted by its express terms. A subsequent amendment to the charter provided that the stock of the company, and its real estate connected with or subservient to the works authorized by its charter, should be exempt from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law referred to. Several years later a new state constitution was adopted, which subjected to taxation the property of all corporations then existing or thereafter created. Subsequent legislation provided for the taxation of the property of railroad companies; and under it the property of the railroad company in question was taxed. *Held*, that the taxation was legal and constitutional. The power reserved to the state by the general law authorized any change in the contract created by the charter between the corporators and the state, as it originally existed, or as subsequently modified, or its entire revocation. *Tomlinson v. Jessup*, 201.
10. Immunity from taxation, constituting a part of the contract between the government and the corporators and stockholders, was, by the reservation of power contained in such general law, subject to be revoked equally with any other provision of the charter, whenever the legislature might deem it expedient. The reservation affected the entire relation between the state and the corporation, and placed under legislative control all rights, privileges, and immunities derived by its charter directly from the state. *Ib.*
11. A railroad company, which by its charter was granted an exemption from taxation for a limited period, was afterwards merged in another railroad company which became invested with all the property, rights, and privileges of the former. *Held*, that the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the

TAXES—Continued.

property so acquired from the former, without express words or necessary intendment to that effect. *Tomlinson v. Branch*, 207.

12. Where two railroad companies are consolidated the presumption is, that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. *Ib.*
13. The property of a railroad company, not exempted from taxation by the original act of incorporation, was made exempt by an act amending the charter. An act subsequent to the amendatory act conferred upon another railroad company, previously incorporated, but which had never built its road, all the rights, powers, and privileges granted by the charter of the company first mentioned. *Held*, that among the privileges conferred upon the other company by this legislation, was the exemption of its property from taxation. The effect of the statute last mentioned could not be limited to the rights, powers, and privileges granted by the original act of incorporation. *Humphrey v. Pegues*, 218.
14. The power of the legislature to grant to such a corporation a perpetual immunity from taxation can not be questioned. And such a provision in the charter constitutes a contract which the state can not subsequently impair. *Ib.*
15. The charter of a railroad company provided that the company should be subject to a certain specified tax, and that no other tax should be imposed. *Held*, that the exemption extended to a tract of gravel land purchased to provide materials for the repair of the road, and also to a branch road connecting such gravel-pits with the main road. *Ib.*
16. The rule is established, by the course of decisions in New Jersey, that such an exempting clause will protect all property held by the company necessary to accomplish the end for which it was incorporated. And the exemption is not limited to property that is indispensable to the purpose of the incorporation; it extends to all things suitable and proper for carrying into execution the powers granted. *State of New Jersey v. Hancock*, 223.
17. The rails, sleepers, ties, and spikes of a railroad, so laid into and attached to the soil of the street as to become a part of the realty, are real estate, and as such liable to assessment for the expense of paving the street through which they were laid, equally with any other real estate especially benefited by the improvement. *City of New Haven v. Fair Haven & Westville R. R. Co.*, 230.

TAXES—Continued.

18. Where the charter of a city provides that an assessment of the expense of paving a street shall be a lien upon the property benefited, the question whether such a lien can attach to the track of a street railway, assessed with a portion of the expense, is not important in determining the validity of the assessment. The right and power to assess are in no way dependent upon a lien. The lien is merely a security in addition to a proper remedy at law; and an action of debt will lie to recover such assessment. *Ib.*
19. Upon a question of want of jurisdiction of the city to make such assessment, the railway company is not confined to its remedy by appeal from the assessment, given by the city charter, but may show want of jurisdiction in defense to an action brought to recover the assessment. *Ib.*
20. In an action to recover the amount of an assessment upon the property of a street railway company, of part of the expense of paving the street in which its track is laid, where the company has suffered the city to make the improvement and incur the expense, with full knowledge of the proceedings, and without objection, it is estopped from setting up the claim that its charter required it to pave the road covered by the track at its own expense. *Ib.*
21. Under a statute which, in regulating the taxes to be paid by street railway companies, exempts them from liability for repairs of the street "outside of their tracks," a company having two parallel tracks on the same street is not liable for the expense of repairing the street between its two tracks, and not within either of them. *City of St. Louis v. St. Louis R. R. Co.*, 287.

TICKETS.

As to the effect of peculiar forms of passengers' tickets, see **CARRIERS**, 44-46, 69, 70.

TIME.

See **REASONABLE TIME**.

WITNESSES.

In examining a medical expert, the counsel propounding a hypothetical question may, for the purposes of the question, assume any state of facts within the limits of the evidence, and ask the opinion of the witness upon the facts assumed. *Filer v. New York Central R. R. Co.*, 460.

As to the mode of examining witnesses, see **CARRIERS**, 56; **PENALTIES**, 4.

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